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No. ____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LOCAL UNION 1011, UNITED STEELWORKERS OF AMERICA. AFL-CIO-CLC,

Petitioner,

v.

ALEXIS HERMAN, Secretary of Labor,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under this Court's decision in *Local 3489 Steelworkers v. Usery*, 429 U.S. 305 (1977), union "meeting attendance" candidacy eligibility rules—rules requiring prospective candidates to attend a stated number of union meetings—are to be judged

   (a) by a single-factor "impact" standard, as the D.C. Circuit holds;

   (b) by the Secretary of Labor's historic multi-factor 29 C.F.R. 452.38(a) standard, as the First Circuit holds; or

   (c) by a multi-factor "onus of justification" standard, as the Seventh Circuit holds?

2. Whether judged by the correct legal standard, the current United Steelworkers of America meeting attendance rule—as amended by the Union in 1978 in the wake of this Court's *Local 3489* decision, and as approved by the Secretary of Labor as a reasonable rule at that time—is a rule that is a "reasonable [candidacy] qualification" within the meaning of § 401(e) of the Labor-Management Reporting and Disclosure Act of 1959?

PARTIES

All parties are listed in the caption of the case.

There are no parent companies or nonwholly owned subsidiaries involved.

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PETITION FOR A WRIT OF CERTIORARI

Local 1011, United Steelworkers of America prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit in *Herman v. Local Union 1011, United Steelworkers of America*, 7th Cir. No. 99-3146.

OPINIONS BELOW

The opinion of the court of appeals is reported at 207 F.3d 924 and is reproduced in the appendix to this petition at App. 1a-8a. The opinion of the district court—the United States District Court for the Northern District of Indiana—is reported at 59 F.Supp.2d 770 and is reproduced at App. 9a-35a.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2000. On June 12, 2000, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including July 21, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 401(e) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481(e), provides in relevant part as follows:

> In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed).... The election shall be conducted in accordance with the

constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title.

STATEMENT

This action by the Secretary of Labor under § 401(e) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481(e), seeks to set aside the Local 1011, United Steelworkers of America ("Local 1011") election of officers on the ground that a candidacy eligibility rule under which the election was conducted—the "meeting attendance" rule—is an unreasonable rule within the meaning of LMRDA § 401(e). The meeting attendance rule—made binding on the approximately 2,000 Steelworker local unions by the United Steelworkers of America ("USWA") Constitution—provides that a member who wishes to be a candidate for and hold local union office must, in the two-year period preceding the election, attend at least one-third of the monthly membership meetings that the member was not prevented from attending due to conflicting work hours, conflicting union business, illness, a death in the family, jury duty, or military service.

This case, particularly as it reaches this Court, is as much the product of the Secretary of Labor's administration of LMRDA § 401(e)—both overall and with particular regard to union meeting attendance candidacy eligibility rules—and of the train of LMRDA § 401(e) meeting attendance rule litigation both before and after this Court's pivotal decision in *Local 3489 Steelworkers v. Usery*, 429 U.S. 305 (1977), as it is about the particular USWA meeting attendance rule and its application to the Local 1011 election of officers at issue. We therefore state the case by outlining its administrative and litigation background and by then setting out the particulars here.

1. From the LMRDA's enactment, the Secretary has promulgated regulatory guidelines for distinguishing meeting attendance rules that are "reasonable" under LMRDA § 401(e) from those that are "unreasonable." At the time of this Court's *Local 3489 Steelworkers* decision, the pertinent § 401(e) interpretive regulation was codified at 29 C.F.R. 452.38(a) (1977). The regulation stated (then as now) that meeting attendance rules can serve legitimate union interests in "insur[ing] that candidates have a demonstrated interest in and familiarity with the affairs of the organization," and went on to provide:

> [T]he reasonableness [of a meeting attendance requirement] must be gauged in the light of all the circumstances of the particular case, including not only the frequency of meetings, the number of meetings which must be attended, and the period of time over which the requirement extends, but also such factors as the nature, availability and extent of excuse provisions, whether all or most members have the opportunity to attend meetings, and the impact of the rule, *i.e.*, the number or percentage of members who would be rendered ineligible by its application. [29 C.F.R. 452.38(a) (1977)].

2. The foregoing regulation accurately memorializes the Secretary of Labor's position that the "percentage-rendered-ineligible factor" is not controlling—a position the Secretary adopted in the early days of the statute and maintained in the period following this Court's decision in *Local 3489 Steelworkers*.

Prior to *Local 3489*, for example, the Secretary stated in a 1966 position letter that "[i]t would be less than fair to attack a meeting attendance requirement simply because of the failure of union members to actually attend meetings (thus leading to their disqualification for office)," inasmuch as that

approach to measuring reasonableness "tend[s] to unduly penalize the legitimate interest of a union in encouraging participation in the affairs of the union."

And, in the period following the *Local 3489* decision, the Department of Labor—under the administration of a number of different Secretaries and in cases involving both the Steelworkers and other unions—declined union member petitions to bring suit to set aside elections conducted under union meeting attendance requirements that a high proportion of the union's members had failed to satisfy. In each instance, the Secretary provided the union member with a written "Statement of Reasons" explaining why, under the factors set forth in the regulations, the Secretary had declined to bring suit.

To take one example from several cited to the courts below, in a 1978 Statement of Reasons for declining to bring suit involving an Electrical Workers election run under a rule requiring attendance at one-half of the twelve monthly meetings preceding the election, and where 97% of the union's members did not attend the requisite number of meetings, the Secretary stated, first, that "neither the number of meetings required nor the period of time involved imposes an unreasonable restriction on a member's right to seek union office"; and, second, that "[i]t is the position of the Department of Labor that if a meeting attendance rule is otherwise reasonable, the rule will not be held unreasonable on the basis of its impact on membership eligibility alone."

3. In the *Local 3489 Steelworkers* case itself, the Secretary invoked the 29 C.F.R. 452.38(a) multi-factor standard to challenge the Steelworker meeting attendance rule in force at that time, which required a member to attend *one-half* the monthly meetings over a *three-year* period and which, in the particular election at issue, had the effect of rendering ineligible for office the 96.5% of the union's members who

did not attend the requisite number of meetings. As explained in more detail below, this Court upheld the Secretary's position that the Steelworker one-half-of-meetings/three-year rule was unreasonable. *Infra* at pp. 13-14.

4. In the wake of the *Local 3489* decision, the delegates at the USWA's 1978 biennial convention amended the USWA Constitution to adopt the current meeting attendance rule requiring attendance at *one-third* of the monthly meetings over a *two-year* period. And, "in 1978, just after the *Steelworkers* decision, the Department of Labor [first] reviewed the current USWA attendance rule under its interpretive regulations [and then] provided an official statement to the USWA indicating that its rule 'would be regarded as reasonable within the guidelines even if ... [a] high proportion of the membership'" did not attend the required number of meetings. App. 17a (quoting Department of Labor Statement at 1); *see also* 1978 Department of Labor Statement at 2 ("The rule discussed above (one-third of the meetings in the 24 months preceding the election) would, in our judgment be reasonable as to the number of meetings required to be attended and would not be subject to challenge because of the percentage of the membership which failed to qualify"). The Secretary stated as well that an essential condition of her approval of the amended meeting attendance rule was that the rule contain a liberalized excuse provision which recognized four valid excuses for non-attendance at meetings ("death in the family, illness or other incapacity, jury duty, military service") in addition to the two reasons that previously had been recognized (conflicting work hours and conflicting union business). 1978 Department of Labor Statement at 1-2.

5. The Secretary's longstanding multi-factor standard for determining the validity of meeting attendance rules was then frontally attacked in *Doyle v. Brock*, 821 F.2d 778 (D.C. Cir.

1987). In a 2-1, decision, the D.C. Circuit held that a showing that 97% of the membership had not attended the required six monthly meetings in the year prior to a union election made out a *per se* violation of LMRDA § 401(e), and that it was an abuse of discretion for the Secretary to decline to bring suit to set aside the election, regardless of whether the six-meeting/one-year rule imposed any significant burden on candidacies and regardless of whether any or all of the other factors in the 29 C.F.R. 452.38(a) regulations weighed in favor of the rule's reasonableness. The *Doyle* majority based its holding on its reading of this Court's decision in *Local 3489 Steelworkers*—a reading that Judge Silberman, dissenting, disputed. *Compare* 821 F.2d at 785 (majority opinion) *with id.* at 787 (Silberman, J. dissenting). *See also infra* at pp. 14-15 (further discussing *Doyle*).

The Secretary thereafter announced that "the Department under *Doyle* will take enforcement action whenever a meeting attendance requirement disqualifies a large portion of a union's membership from candidacy," 60 Fed. Reg. 26391 (May 17, 1995), and provided a single reason for her new enforcement policy:

> Since *Doyle* was decided in the District of Columbia Circuit, where the Secretary is located, and since ... any member may bring litigation against the Secretary for judicial review of his decision not to take enforcement action, a decision by the Secretary not to follow *Doyle* in another circuit would be susceptible to successful legal challenge in the D.C. Circuit. [*Id.*]

Concurrent with this statement, the Secretary formally amended her meeting-attendance-rule interpretive regulation —29 C.F.R. 452.38(a)—by making one footnote change to the regulation stating as follows:

> If a meeting attendance requirement disqualifies a large portion of members from candidacy, that large

> antidemocratic effect alone may be sufficient to render the requirement unreasonable. In *Doyle v. Brock*, 821 F.2d 778 (D.C. Circuit 1987), the court held that the impact of a meeting attendance requirement which disqualified 97% of the union's membership from candidacy was by itself sufficient to make the requirement unreasonable notwithstanding any of the other factors set forth in 29 C.F.R. 452.38(a) [29 C.F.R. § 452.38(a) n.25].

5. The instant lawsuit was brought under the new enforcement policy reflected in the footnote just quoted. The election that gave rise to the lawsuit was held by Local 1011 in April 1997. App. 10a. In the two-year period preceding the election, the Local held duly noticed monthly Thursday 5:30 p.m. membership meetings at a union hall located less than two miles from the East Chicago, Indiana LTV steel plant where the Local's members worked.[1]

In the months leading up to the election, the "Steelworkers Caucus" and the "Concerned Members Caucus" formed two separate slates of eleven candidates to compete for the eleven local union offices at stake. The Concerned Members Caucus was headed by the incumbent President, Dennis Henry, who had gained his position by challenging and defeating the previous incumbent in 1994 when Henry was a rank-and-file

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[1] In the USWA, monthly membership meetings play a central role in the governance of local unions. As set out in the USWA Bylaws for Local Unions, which were part of the summary judgment record, USWA local unions are governed through a form of direct democracy according to which the approval of the majority of members in attendance at a local union meeting is required before local union officers may take any action that would require the expenditure of local union funds, and before the officers may take other significant actions. *See* USWA Bylaws, Art. V, § 5(c).

member. At the nomination meeting conducted by the Local one month prior to the 1997 election, all twenty-two individuals on the two competing slates were nominated for the eleven offices, as was one other individual not affiliated with either slate. All twenty-three nominees had attended a sufficient number of meetings to satisfy the above-described "meeting attendance rule"; none were disqualified by the rule; thirteen of the twenty-three were non-incumbents. App. 11a. Previous Local 1011 nomination meetings had produced similar results: At least two candidates eligible under the meeting attendance rule qualified for and appeared on the ballot for each one of the eleven officer positions in each Local 1011 election since 1982—which is far back as Local 1011's records go.

In the 1997 election at issue here, then, none of the 23 nominees were ineligible under the meeting attendance rule (nor were any members identified who would have sought a nomination but for the rule). At the same time, the large majority of Local 1011 members did not attend a sufficient number of meetings to satisfy the rule. The parties stipulated that approximately 242 of the Local's 2990 members (8%) satisfied the requirements of the rule and that the remainder (92%) did not. App. 11a.

6. In her summary judgment submission to the district court, the Secretary of Labor rested her challenge to the USWA meeting attendance rule as it applied to Local 1011's 1997 election on a single ground: that, under the *per se* "percentage ineligible" standard announced by the D.C. Circuit in *Doyle* and incorporated by the Secretary into her regulations in 1995, the USWA rule was unreasonable because a high percentage of the Local's members failed to attend a sufficient number of meetings to qualify as a candidate under the rule. As the district court noted, "the Secretary made it clear in her reply [to Local 1011's motion

for summary judgment] that her case 'is predicated entirely on the fact that, even with a liberal excuse provision, 92 percent of the members of Local 1011 were barred from running for office.'" App. 18a.

Local 1011, in response, argued that *Doyle* is unsound, and that—as the Secretary herself had found in her 1978 position letter—the USWA rule is a reasonable rule when assessed under the Secretary's pre-*Doyle* multi-factor reasonableness standard.[2]

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[2] As part of its summary judgment submission in support of the reasonableness of the USWA rule, Local 1011 submitted without objection the expert declaration of University of Texas professor and former Labor Secretary Ray Marshall, which states, in its essence:

- First, that the USWA meeting attendance rule, by inducing members who are considering challenging the incumbent officers to attend local union meetings, serves the substantial union interest in making the meetings themselves more democratic. "[O]nce [potential opposition candidates] are present at the meetings, they are apt to voice their opinions, and there is therefore a chance that their views will lead members to reject, modify, or approve after deliberation officer recommendations that otherwise might be rubber-stamped." Thus, "[i]t is more important ... that attendance at union meetings [include] ... persons who are apt to dissent from the incumbent administration's program" than "that attendance be high in absolute terms."

- Second, that the USWA meeting attendance rule is well-suited to serving the union interest in attracting potential opposition candidates to the meetings, because the rule requires attendance at a number of meetings that is high enough to induce attendance at a significant number of meetings, but that is not so high as to require members to make up their mind about a potential candidacy at a time that is too early in the election cycle for potential candidates to have begun contemplating a candidacy.

In its July 21, 1999 opinion, the district court granted the Secretary of Labor's motion for summary judgment and denied the Local's cross-motion.

7. The Seventh Circuit, in an opinion by Chief Judge Posner, affirmed. The court of appeals, like the district court, rejected the D.C. Circuit's view in *Doyle* that this Court's *Local 3489 Steelworkers* decision requires the invalidation of a meeting attendance rule any time that a high percentage of members do not choose to satisfy it. App. 5a-6a, 26a. The court of appeals also declined to defer to the Secretary's footnote regulation incorporating *Doyle*. App. 5a.

After rejecting *Doyle*, the court of appeals, rather than applying the reasonableness standard developed and applied by the Secretary of Labor when she was unencumbered by *Doyle* and by her *Doyle* footnote, fashioned its own novel three-factor "onus of justification" standard for determining the validity of meeting attendance rules. App. 7a.

First, to show that its attendance requirement serves an important union interest, a union must, under the Seventh Circuit's test, show that its attendance requirement is so unbending that even a member who is legitimately excused from attending every meeting and who therefore is "without fault in failing to satisfy" the requirement, is denied the right

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- And third, that the excuse provisions contained in the Steelworkers' constitution, which are limited to excuses that are beyond the practical control of the member, do not undermine the purposes of the underlying attendance rule, "because attendance, by hypothesis, cannot be induced from members whose conflicting demands make meeting attendance a practical impossibility," and "because a union member who cannot attend a meeting for reasons beyond his or her control is not demonstrating any lack of commitment to union affairs by missing a meeting."

to run for office. App. 4a. Second, a union must show that its rule requires attendance at the fewest possible meetings to serve its institutional interest, *viz.* that there is no less restrictive "alternative inducement[]" to encourage attendance at meetings. App. 7a. And, third a union must prove that its meetings are run in accordance with various procedures of the Seventh Circuit's devising, including, *e.g.*, the "distribut[ion]" to all members in advance of the meeting of an "agenda or other [similar] material." App. 3a.

The court of appeals then applied its newly minted "onus of justification" factors to this case and held that those factors were not satisfied here. App. 3a, 4a, & 7a.

REASONS FOR GRANTING THE WRIT

In *Local 3489, Steelworkers v. Usery*, 429 U.S. 305 (1977), this Court granted *certiorari* to consider the most important, most litigated, and most contentious question raised by Labor-Management Reporting and Disclosure Act § 401(e)—the proper application of that provision, which regulates union candidacy eligibility rules, to the eligibility rule, widespread in the labor movement, requiring attendance at a stated number of union meetings.

In the wake of the *Local 3489* decision, that question continues to be the most important, most litigated, and most contentious LMRDA § 401(e) question. The *Local 3489* decision, rather than settling the meaning of LMRDA § 401(e) and its application to union meeting attendance rules, has instead generated a new round of legal controversy as vigorous as the first.

This time it is a controversy over the proper reading of the *Local 3489* decision. And, first the D.C. Circuit, then the First Circuit, and now the Seventh Circuit, have read this Court's *Local 3489* decision in three different and irreconcilable ways.

By reason of that conflict, every union election run under a meeting attendance rule is in jeopardy to a court challenge by the Secretary of Labor on a *post hoc* evaluation of the rule's "impact," and the validity of each such election is subject to a different outcome-determinative legal test depending on the circuit in which the Secretary brings suit.

This LMRDA § 401(e) legal controversy cannot be settled by the Secretary of Labor's—or by a Court of Appeal's—reading of the *Local 3489* decision and its lessons; the disagreements in that regard make that plain. Only this Court's gloss on its own prior *Local 3489* decision can do so. This petition therefore returns the LMRDA § 401(e) meeting attendance rule question to this Court for its further consideration and for its authoritative resolution.

1. LMRDA § 401(e) provides that "a reasonable opportunity shall be given for the nomination of candidates [to union office] and every member in good standing shall be eligible to be a candidate and hold office (subject to . . . *reasonable qualifications* uniformly imposed)." (Emphasis added). Thus, § 401(e) does not create an absolute public law right to be a candidate, but seeks instead to accommodate the interest of union members in becoming candidates with the interest of unions as private voluntary associations in establishing rules to govern their own affairs. That balanced accommodation between individual union member rights and institutional union rights runs throughout the LMRDA. *See generally Steelworkers v. Sadlowski*, 457 U.S. 102, 117 (1981); *Wirtz v. Bottle Blowers Ass'n*, 389 U.S. 463, 470-71 (1968) (In enacting the LMRDA, "Congress weighed how best to legislate against revealed abuses in union elections without departing needlessly from its long-standing policy against unnecessary governmental intrusion into internal union affairs.").

Nowhere are these rights more important—or the striking of the proper balance more sensitive—than with regard to candidacy eligibility rules. Recognizing that the LMRDA § 401(e) "reasonableness" standard is central to the administration of the Act, the Secretary of Labor at an early point exercised her institutional expertise to establish regulatory guidelines that serve to distinguish reasonable from unreasonable eligibility rules in general, and for distinguishing reasonable from unreasonable meeting attendance eligibility rules in particular. *See* 29 C.F.R. 452.36 (standards governing eligibility rules generally); *id.* 452.38 (standards governing meeting attendance rules). The Secretary treated with meeting attendance eligibility rules as a separate category out of the recognition that "many unions had such requirements at the time the LMRDA was enacted." 60 Fed. Reg. 26391 (May 17, 1995).

2. In *Steelworkers Local 3489*, the Secretary of Labor, invoking her multi-factor 29 C.F.R. 452.38(a) "reasonable meeting attendance rule" regulation (quoted *supra* at p. 3), brought suit to set aside an election conducted under a predecessor Steelworker rule which required attendance at *one-half* of the monthly meetings in a *three-year* period and which 96.5% of the local union's members had not satisfied.

As the *Local 3489* Court noted, the Secretary there made a two-pronged argument: that "the failure of 96.5% of the local members to satisfy the meeting-attendance requirement," taken together with "the rule's effect of requiring potential insurgent candidates to plan their candidacies as early as 18 months in advance of the election when the reasons for their opposition might not have yet emerged," established "that the requirement has a substantial antidemocratic effect on local union elections." 429 U.S. at 308.

This Court upheld the Secretary's position, relying first on the high percentage of members that failed to qualify, 429

U.S. at 310 (noting that a requirement that results in the disqualification of 96.5% of the members "hardly seems to be a 'reasonable' qualification"), and then on the rule's adverse effect on potential insurgent candidates, *id.* at 312 ("very few members ... are likely to see themselves as such sufficiently far in advance of the election to be spurred to attendance" by a rule requiring attendance to begin 18 months before the election). In so doing, the Court rejected the union's argument that the absence of more specific guidance from the Secretary on the interplay of the various factors bearing on reasonableness set out in 29 C.F.R. 452.38(a) left unions without sufficient direction in drafting and maintaining valid meeting attendance rules. *Id.* at 313. In this latter regard, the Court, after quoting the text of the Secretary's 29 C.F.R. § 452.38(a) regulation, stated that such a "flexible" standard is what Congress "clearly contemplated." *Id.*

3. There is now a three-way disagreement among the Courts of Appeals over the meaning of the *Local 3489 Steelworkers* decision and over the LMRDA § 401(e) standard by which to determine the reasonableness of meeting attendance rules.

(a) In *Doyle v. Brock*, *supra*, the D.C. Circuit overturned the Secretary's determination *not* to bring suit to set aside an election where the meeting attendance rule in question required attendance at six meetings in the twelve months preceding the election and where 97% of the members had failed to satisfy that requirement.

In response to the Secretary's submission that six months before an election, potential campaign issues typically *will* have emerged and that potential candidates *will* be spurred to attendance by a meeting attendance rule, the D.C. Circuit concluded that *Local 3489* made the percentage-disqualified factor dispositive in meeting attendance rule cases. 821 F.2d at 785.

The *Doyle* majority reached that conclusion by reading *Local 3489 Steelworkers* as standing for the proposition that, "although ... attendance requirements are to be subjected to case-by-case analysis, the analysis is limited to determining only if 'the anti-democratic *effects* of the meeting-attendance rule outweigh the *interests* urged in its support.'" 821 F.2d at 785 (quoting *Local 3489 Steelworkers*, 429 U.S. at 31) (emphasis in *Doyle*). And, according to the *Doyle* majority, the interests urged by the Secretary in support of meeting attendance rules had already been rejected by this Court as insufficient to justify any rule that has the effect of rendering a high percentage of the union's members ineligible. 821 F.2d at 785.

Judge Silberman, dissenting, stated that "[t]he difficulty with the majority opinion ... is that the [Supreme] Court in *Steelworkers* assiduously avoided the holding that my colleagues ascribe to it.... Indeed, the Court in approving the Secretary's case-by-case approach to attendance requirements noted that the policy—which remains unchanged—weighed, *inter alia*, the period of time over which the requirement extends." 821 F.2d at 787. Judge Silberman added:

> [T]he majority does more than simply fail to give deference to the Secretary. It also eviscerates the "reasonableness" standard of § 401(e). The logic of the majority's opinion would require the Secretary to sue to overturn an election if a union attendance requirement, no matter how innocuous, turned out in hindsight to disqualify some percentage (presumably in excess of 90%) of the membership." [*Id.*]

Thereafter, as we have noted (*supra* at pp. 6-7), the Secretary announced that "the Department under *Doyle* will take enforcement action whenever a meeting attendance requirement disqualifies a large portion of a union's membership from candidacy," stating as her sole reason for so doing that "any member may bring litigation against the

Secretary" in the D.C. Circuit, and that "a decision by the Secretary not to follow *Doyle*" therefore would always "be susceptible to successful legal challenge in the D.C. Circuit." 60 Fed. Reg. 26391.

(b) In the first case to adjudicate an election challenge brought by the Secretary under her *Doyle* enforcement policy, *Herman v. Springfield Massachusetts Area Local 497, Postal Workers*, 201 F.3d 1 (2000) ("*Postal Workers*"), the First Circuit rejected *Doyle*'s reading of *Local 3489 Steelworkers*, embraced Judge Silberman's, and upheld a meeting attendance rule which required attendance at one-third of the meetings in the twelve-month period before the election — a rule that over 96% of the union's members had not satisfied. In particular, the First Circuit reasoned that "if *Steelworkers* is taken to impose a rigid, one-factor test based on percentage, much of the opinion becomes surplusage, particularly the section in which the Court approved the Secretary's own flexible multi-factor test for reasonableness." 201 F.3d at 5.

Having rejected the proposition that the percentage test is controlling, the First Circuit went on to hold that it "shared" the Secretary's pre-*Doyle* view of the *Local 3489, Steelworkers* decision, 201 F.3d at 5, according to which the several factors stated in 29 C.F.R. 452.38(a)—and not just the "impact" factor—were to be consulted in judging the reasonableness of a meeting attendance rule that a high proportion of a union's members do not satisfy. Since the Secretary did not contend that the rule was unreasonable under those factors, and since the Postal Workers' rule—in requiring attendance to begin four months before the election and in allowing credit for excused non-attendance due to conflicting work hours and other compelling reasons—was not burdensome or otherwise unreasonable under those factors, the First Circuit upheld the rule. 201 F.3d at 3.

(c) The Seventh Circuit in this case took yet a third approach: The court below, like the First Circuit, disagreed with *Doyle*'s reading of *Local 3489 Steelworkers* and rejected as well the Secretary's reliance on the footnote in her regulation incorporating *Doyle*. App. 5a ("We agree with the union that the footnote is entitled to little weight... I[t] is inconsistent with the body of the regulation, which makes no factor controlling; and the only reason the Department gave for it ... is the perceived futility of bucking a decision by the District of Columbia Circuit that appeared to have adopted the per se approach, *Doyle v. Brock*, *supra*. And it is wrong.").

But, in contrast with the First Circuit, the Seventh Circuit, after rejecting the footnote, did not return to the regulation and the enforcement policy the Secretary had adopted when unencumbered by *Doyle*; rather, the court below, without explaining its departure from the Secretary's pre-*Doyle* approach, read *Local 3489* as permitting the imposition of a newly-devised "onus of justification" on the union, requiring the union to establish that its rule is valid under three "reasonableness" factors established by that court. App. 7a.[3] The Seventh Circuit's approach is entirely novel. None of

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[3] As we have noted in the statement, the Seventh Circuit's first "reasonableness" criterion is that a meeting attendance rule must be so inflexible in demanding attendance as to make even "the fact that a member was without fault in failing to satisfy it" insufficient to "excuse the failure." App. 4a. Its second "reasonableness" criterion is that the union must show that its rule requires attendance at the fewest possible meetings necessary to serve its institutional interests, *viz.*, that there is no less restrictive alternative eligibility rule. App. 7a. And, its third "reasonableness" criterion is that the union must show that its meetings are conducted according to various procedures of that court's devising, such as mailing of agendas in advance of each meeting to all members. App. 3a.

that court's "reasonableness" criteria had been consulted, much less deemed dispositive, by the Secretary, by the First Circuit, or by any other court.

4. The D.C. Circuit's *Doyle* decision, the Secretary's *Doyle*-compelled enforcement policy, the First Circuit's *Postal Workers* decision, and the Seventh Circuit's decision here create an arbitrary, irrational LMRDA § 401(e) regime that cannot be justified by the interest in protecting the right to be a candidate and that entirely overrides the interest in union self-government—particularly where the union is national in scope and has provided in its constitution for a uniform meeting attendance rule applicable in all local unions throughout the country.

Under this regime, the Secretary will bring suit to overturn any election run under a meeting attendance rule that does not pass a pure *post hoc* "impact" test. Very simply stated, that test makes no sense on its own terms. As the First Circuit explained in *Postal Workers*, "looking at 'impact' solely from the nomination day perspective is misleading. Since most union members do not intend to run for office in a given election, most are not going to trouble to meet *any* precondition that requires them to do anything different from what they ordinarily do—no matter how slight the burden or how reasonable a condition for those who do wish to be candidates." 201 F.3d at 4 (emphasis in original).

The Secretary's statement of her enforcement policy offers no justification on the merits for that policy, much less a justification that counters that salient point made by the First Circuit. What that statement shows is that she has adopted her enforcement position, not because of a belief that an unadorned percentage test measures the reasonableness of candidacy eligibility rules, but because of the fact that "any member may bring litigation against the Secretary" in the D.C. Circuit where *Doyle* was decided, 60 Fed. Reg. 26391,

and, in the words of the Seventh Circuit here, because of the resulting "perceived futility of bucking a decision by the District of Columbia Circuit," App. 5a.

To exacerbate the situation, when the Secretary *does* bring suit, the test of validity of the attendance rule in question does not (outside the District of Columbia) correspond to the test of validity that informed the Secretary's determination as to whether the suit should be brought in the first instance. Instead, the governing legal standard varies depending upon where the suit has been brought. And, because the different tests yield different results, the results will also vary depending on where the suit has been brought.

In the case of USWA local unions, if the suit is brought in the First Circuit, the multi-factor 29 C.F.R. 452.38(a) test applies, and, under that test — as the Secretary determined when the USWA's current rule was adopted, *see supra* at p. 5—the USWA rule passes muster as a reasonable rule.

If, however, the suit is brought in the Seventh Circuit, a test applies that is different in all of its particulars from the First Circuit/29 C.F.R. 452.38(a) multi-factor test. Indeed, in one of its particulars, the Seventh Circuit test treats as *fatal* to the validity of a meeting attendance rule a factor that the First Circuit/29 C.F.R. 452.38(a) test treats as weighing *in favor* of validity: *viz.*, the existence of an excuse provision.

While a provision excusing non-attendance "on a showing of job requirements or other compelling reasons" evinces a meeting attendance rule's reasonableness in the First Circuit, *see Postal Workers*, 201 F.3d at 3, in the Seventh Circuit such a provision undermines the credibility of the union's justification for the rule, on the theory that "if the meeting-attendance requirement were regarded as a vital condition of effective officership ... the fact that a member was without fault in failing to satisfy it would not excuse the failure," App. 4a. Thus, the Seventh Circuit's, test of reasonableness

is one a union meeting attendance rule can pass only if it omits an excuse provision of the kind that the Secretary long has treated as *indispensable* to a rule's reasonableness under the 29 C.F.R. 452.38(a) multi-factor test.

The upshot of all of this is an utterly incoherent § 401(e) regime that serves no discernable set of interests. That regime is the product of warring Court of Appeals decisions—with one circuit reading this Court's *Local 3489 Steelworkers* decision as requiring the Secretary to sue on a single-factor "impact" theory that she had never embraced on her own and two other circuits rejecting both that reading of *Local 3489* and the single-factor impact test as unsound. Such a regime should not continue. And only a decision of this Court can bring the current regime to a well-deserved end.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 99-3146

ALEXIS M. HERMAN, Secretary of Labor,
Plaintiff-Appellee,

v.

LOCAL 1011, UNITED STEELWORKERS OF AMERICA,
AFL-CIO, CLC,
Defendant-Appellant.

Argued Feb. 11, 2000
Decided March 23, 2000

Before POSNER, Chief Judge, and MANION and KANNE, Circuit Judges.

POSNER, Chief Judge.

Section 401(e) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481(e), makes all union members in good standing eligible to run for office in the union's elections subject to "reasonable qualifications uniformly imposed." The constitution of the steelworkers international union conditions eligibility for local office on the member's having attended at least eight of the local's monthly meetings (or been excused from attendance at them,

in which event he must have attended one-third of the meetings from which he was not excused) within the two years preceding the election. Noting that the rule disqualifies 92 percent of the almost 3,000 members of Local 1011 of the steelworkers union, the district judge, at the behest of the Secretary of Labor, upon cross-motions for summary judgment declared the rule void.

The Act's aim was to make the governance of labor unions democratic. Local 3489, United Steelworkers of *America v. Usery*, 429 U.S. 305, 309, 97 S.Ct. 611, 50 L.Ed.2d 502 (1977); *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, 496-98, 88 S.Ct. 1743, 20 L.Ed.2d 763 (1968); *Wirtz v. Local Union No. 125, Laborers' Int'l Union*, 389 U.S. 477, 483, 88 S.Ct. 639, 19 L.Ed.2d 716 (1968); *Donovan v. Local Union No. 120, Laborers' Int'l Union*, 683 F.2d 1095, 1102 (7th Cir.1982). The democratic presumption is that any adult member of the polity, which in this case is a union local, is eligible to run for office. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793-95, 819-20, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995); *Powell v. McCormack*, 395 U.S. 486, 547, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). The requirement in the U.S. Constitution that the President be at least 35 years old and Senators at least 30 is unusual and reflects the felt importance of mature judgment to the effective discharge of the duties of these important offices; nor, as the cases we have just cited hold, may Congress or the states supplement these requirements. It would be absurd to think that Senators, for example, should be required as a qualification of holding office to have attended a specified number of Senate sessions so that they would better understand how the Senate operates and the nature of the issues it deals with.

As an original matter we would think it, not absurd, but still highly questionable, to impose a meeting-attendance requirement on aspirants for union office, at least in the

absence of any information, which has not been vouchsafed us, regarding the character of these meetings. All we know is that they are monthly and that the union's constitution requires that all expenditure and other decisions of the union's hierarchy be approved at these meetings; yet despite the formal power that the attendants exercise, only a tiny percentage of the union's membership bothers to attend—on average no more than 3 percent (fewer than 90 persons). We are not told whether an agenda or any other material is distributed to the membership in advance of the meeting to enable members to decide whether to attend and to enable them to participate intelligently if they do attend. We do not know how long the meetings last or what information is disseminated at them orally or in writing to enable the attenders to cast meaningful, informed votes. For all we know the only attenders are a tiny coterie of insiders not eager to share their knowledge with the rest of the union's members. Cf. Leonard R. Sayles & George Strauss, The Local Union 99-101 (rev. ed.1967); George Strauss, "Union Democracy," in The State of the Unions 201, 209-10 (George Strauss, Daniel G. Gallagher & Jack Fiorito eds. 1991). "Unduly restrictive candidacy qualifications can result in the abuses of entrenched leadership that the LMRDA was expressly enacted to curb." *Wirtz v. Hotel, Motel & Club Employees Union, Local 6, supra*, 391 U.S. at 499, 88 S.Ct. 1743. Cf. *Donovan v. CSEA Local Union 1000, American Federation of State, County & Municipal Employees*, 761 F.2d 870, 875 (2d Cir.1985), remarking the "tight grasp of incumbent leaders."

All we know for sure about this case, so far as bears on the reasonableness of the meeting-attendance requirement, is that the requirement disqualifies the vast majority of the union's members, that it requires members who have not been attending meetings in the past to decide at least eight months before an election that they may want to run for union office

(for remember that the meetings are monthly and that a candidate must have attended at least eight within the past two years unless he falls within one of the excuse categories), and that the union itself does not take the requirement very seriously, for it allows members who have attended no meetings to run for office, provided that they fall into one of the excuse categories. The categories are reasonable in themselves—service with the armed forces, illness, being at work during the scheduled time of the meeting, and so forth—and they expand the pool of eligibles from 95 union members to 242, of whom 53 attended not a single meeting. But if the meeting-attendance requirement were regarded as a vital condition of effective officership, equivalent in importance to the LMRDA's requirement that the candidate be a union member in good standing, the fact that a member was without fault in failing to satisfy it would not excuse the failure. *Doyle v. Brock*, 821 F.2d 778, 786 (D.C. Cir.1987); *Marshall v. Local 1402, Int'l Longshoremen's Ass'n*, 617 F.2d 96, 98 (5th Cir.1980). To excuse compliance would be like permitting a blind person to fly an airplane provided that he had become blind through no fault of his own, or a nonunion member to run for office if he would be a member if only he were a steelworker rather than a stockbroker. So many of the union's members are excused from the meeting-attendance requirement that there could be an election for officers of Local 1011 at which none of the candidates satisfied the requirement.

The requirement is paternalistic. Union members should be capable of deciding for themselves whether a candidate for union office who had not attended eight, or five, or for that matter any meetings within the past two years should by virtue of his poor attendance forfeit the electorate's consideration. *Local 3489, United Steelworkers of America v. Usery, supra*, 429 U.S. at 312, 97 S.Ct. 611; *Wirtz v. Hotel, Motel & Club Employees Union, Local 6, supra*, 391 U.S. at

504, 88 S.Ct. 1743; *Donovan v. Local Union No. 120, Laborers' Int'l Union, supra*, 683 F.2d at 1105; *Donovan v. CSEA Local Union 1000, American Federation of State, County & Municipal Employees, supra*, 761 F.2d at 875. The union's rule is antidemocratic in deeming the electors incompetent to decide an issue that is in no wise technical or esoteric—what weight to give to a candidate's failure to have attended a given number of union meetings in the recent past. Wendell Willkie, when he ran for President in 1940, and Dwight Eisenhower, when he ran for President in 1952, had never held political office; would anyone have doubted that the electorate was capable of deciding whether this circumstance should disqualify either of them from being President? And since most union members interested in seeking an office in the union are likely to attend meetings just to become known, Seymour Martin Lipset, Martin A. Trow & James S. Coleman, Union Democracy: The Internal Politics of the International Typographical Union 222-24 (1956), the rule is superfluous.

The briefs debate the precise significance to be attached to the percentage of union members disqualified from running for office by a challenged eligibility requirement, and to a regulation of the Department of Labor that suggests in a footnote that any requirement which disqualifies 90 percent or more of the members might be (not that it would be) invalid per se. 29 C.F.R. § 452.38(a) n. 25. We agree with the union that the footnote is entitled to little weight. It is vague; it is inconsistent with the body of the regulation, which makes no factor controlling; and the only reason the Department gave for it (*see* "Eligibility Requirements for Candidacy for Union Office," 60 Fed.Reg. 26388, 26390 (May 17, 1995)) is the perceived futility of bucking a decision by the District of Columbia Circuit that appeared to have adopted the per se approach, *Doyle v. Brock, supra*. And it is wrong. As Judge Boudin noted in *Herman v. Springfield Massachusetts Area,*

Local 497, 201 F.3d 1, 4 (1st Cir.2000), the percentage of union members disqualified from running for office by an attendance requirement is a function not only of the reasonableness of the requirement but also of the members' inclinations. Under conditions of pervasive apathy, a requirement of attending even a single meeting might disqualify the vast bulk of the membership. That is true here. Only 14 percent of the members attended even one meeting within the last two years. Yet the Department of Labor does not argue that therefore even a one-meeting requirement would be unreasonable.

We think the proper approach, and one that is consistent with the case law, *see Local 3489, United Steelworkers of America v. Usery, supra*, 429 U.S. at 310-13, 97 S.Ct. 611; *Wirtz v. Hotel, Motel & Club Employees Union, Local 6, supra*, 391 U.S. at 499, 88 S.Ct. 1743; *Donovan v. Local Union No. 120, Laborers' Int'l Union, supra*, 683 F.2d at 1103; *Usery v. Local Division 1205, Amalgamated Transit Union*, 545 F.2d 1300, 1303-04 (1st Cir.1976)—even *Doyle v. Brock, supra*, the most "per se" of the opinions, concedes that "a requirement that has a large antidemocratic effect" might be justified by "show[ing] that the requirement serves valid union interests," 821 F.2d at 785—is to deem a condition of eligibility that disqualifies the vast bulk of the union's membership from standing for union office presumptively unreasonable. The union must then present convincing reasons, not merely conjectures, why the condition is either not burdensome or though burdensome is supported by compelling need. This approach distinguishes, as Judge Boudin did, between impact and burden. *Herman v. Springfield Massachusetts Area, Local 497, supra*, 201 F.3d at 3; see also *Reich v. Local 30, Int'l Brotherhood of Teamsters*, 6 F.3d 978, 988 (3d Cir.1993); *Usery v. Local Division 1205, Amalgamated Transit Union, supra*, 545 F.2d at 1303. A requirement that to be eligible to be a candidate a

member of the union have attended one meeting of the union in his lifetime would not be burdensome even though it might disqualify a large fraction of the union membership simply because very few members took any interest in the governance of the union. That defense is unavailable here, however. Requiring attendance at eight meetings in two years imposes a burden because it compels the prospective candidate not only to sacrifice what may be scarce free time to sit through eight meetings, but also, if he is disinclined to attend meetings for any reason other than to be able to run for union office, to make up his mind whether to run many months before the election.

The burden is great enough in this case to place the onus of justification on the union. The only justification offered is that the requirement of attending eight meetings in two years encourages union members who might want to run for office, perhaps especially opponents of the incumbents, to attend union meetings (since otherwise they may not be eligible to run), thus bolstering attendance at the meetings and fostering participatory democracy. The slight turnout at the meetings suggests that this goal, though worthy, cannot be achieved by the means adopted; the means are not adapted to the end, suggesting that the real end may be different. So far as appears, the union has given no consideration to alternative inducements to attend meetings that would not involve disqualifying from office more than nine-tenths of its members. No argument is made that a three-meeting requirement (upheld in *Herman v. Springfield Massachusetts Area, Local 497, supra*) would fail to satisfy the union's reasonable desire that its officers be both experienced and committed to the union. It is true that even a three-meeting requirement would have disqualified more than 90 percent of Local 1011's members. But there is still a big difference. Under the rule challenged in this case, a union member who wanted to be sure of qualifying for eligibility to run for office

might have to start attending meetings as much as a year in advance of the election, because he might miss one or more meetings for reasons that the union does not recognize as excusing (such as vacation or family leave) and because the union might cancel one or more meetings. And yet a year before the election an issue that might move a union member to incur the time and expense of running for office might not even be on the horizon. *Local 3489, United Steelworkers of America v. Usery, supra*, 429 U.S. at 310-11, 97 S.Ct. 611. (This reasoning led the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, 790-92, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), to hold unconstitutional an early-filing deadline for persons wishing to run as independents in elections for public office.) Suppose for example that six months before the election the union's president were unexpectedly indicted for having stolen union funds with the connivance of the other officers. That is an event that might galvanize opposition to incumbents. But not having been foreseen it could not play a galvanizing role, or as much of a galvanizing role, were it too late for any but a handful of union members to qualify to run against the incumbents.

The district court was right to invalidate the meeting-attendance requirement as unreasonable, and the judgment is therefore

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. INDIANA
Hammond Division

No. 2:97-CV-409-RL

ALEXIS M. HERMAN, Secretary of Labor,
United States Department of Labor,
Plaintiff,

v.

LOCAL UNION, 1011, UNITED STEELWORKERS
OF AMERICA, AFL-CIO, CLC,
Defendant.

July 21, 1999

ORDER

LOZANO, District Judge.

This matter is before the court on (1) the Motion for Summary Judgment filed by Plaintiff, Alexis M. Herman, Secretary of Labor, United States Department of Labor, on December 7, 1998, and (2) the Motion for Summary Judgment filed by Defendant, Local Union 1011, United Steelworkers of America, ALF-CIO, CLC, on January 5, 1999. For the reasons set forth below, the Plaintiff's motion is GRANTED, the Defendant's motion is DENIED, the Court DECLARES VOID the Local 1011 election, and the Court ORDERS a new election under the direction of the Secretary.

Furthermore, it is ORDERED that the parties shall have ten days from the date of this order to report whether further judicial proceedings are necessary in this case. If no party reports that further judicial proceedings are necessary, the Court will enter final judgment consistent with the present ruling.

BACKGROUND

The parties agree to the following facts:

Local 1011 is a labor organization within the jurisdiction of this Court and subject to the provisions of the LMRDA. Statement of Undisputed Facts ¶¶ 1-2. Local 1011 is chartered by and subordinate to the United Steelworkers of America, AFL-CIO, CLC (hereinafter, the "USWA"). *Id.* at ¶ 3. On April 17, 1997, Local 1011, pursuant to the USWA Constitution, concluded the process of conducting its regular triennial election of union officers. In the month preceding the election, Local 1011 accepted nominations of candidates for the election and determined which nominees would be eligible to appear on the ballot. *Id.* at ¶ 4.

Article VII, § 10, of the USWA Constitution provides an attendance requirement for eligibility as follows:

> In order to be eligible for election as a Local Union Officer or Grievance Committee Member in any regular election or election to fill a vacancy, a member shall have attended at least one-third (1/3) of the regular meetings held by the member's Local Union during the twenty-four (24) month period immediately preceding the month in which the election is to be held.
>
> Meetings which a member was prevented from attending because of such member's Union activities, working hours, service in the armed forces of the United States or Canada, sickness which confines, death in the immediate family, or jury duty, shall not be counted as meetings

> held in determining such member's eligibility under this Section 10 . . . .

Id. at ¶ 7. Eleven of the Local 1011 positions for which elections were held in April 1997 were officer positions governed by Title IV of the LMRDA, 29 U.S.C. §§ 481-483. *Id.* at ¶ 8. A total of twenty-three nominations were made by Local 1011 members for these positions, and at least two individuals were nominated for every officer position. *Id.* at ¶ 9. The attendance rule disqualified none of the officer nominees, thirteen of whom were not incumbent officers. *Id.*

At the time of the April 1997 election, the local union had approximately 2990 members in good standing. *Id.* at ¶ 5. Ninety-five members attended the minimum eight or more of the twenty-four monthly meetings in the period preceding the election and thus qualified to be candidates outright; 103 attended at least seven meetings; 112 attended at least six; 130 attended at least five; 156 attended at least four; 193 attended at least three; 247 attended at least two; and 424 attended at least one. *Id.* at ¶ 10. Once the excuse provision of the attendance requirement is taken into consideration, there were 242 members who were eligible to be candidates, fifty-three of whom did not attend any meetings at all, but were eligible under the excuse provision because they worked on Thursday afternoons when the meetings were regularly held. *Id.* at ¶ 11.

After the election, John Sako and Anderson Bell, both of whom were eligible under the attendance requirement, but were disqualified for other reasons, filed a timely internal protest with Local 1011 regarding the 1997 elections. *Id.* at ¶¶ 15-16. The local union denied the protest, and they appealed the denial to the International Union, which also denied the protest. *Id.* at ¶¶ 16-17. After exhausting their available union remedies, Sako and Bell filed a timely

complaint with the Secretary of Labor, alleging several grounds for setting the election aside. *Id.* at ¶ 18. The Secretary did not find probable cause with regard to any of the grounds except the attendance rule, and filed a timely complaint on that basis. *Id.*

Local 1011 posted a notice of the upcoming March 13, 1997, nominations on or around March 1, 1997, and notified members of the April 17 elections by a posting on March 24, 1997, and by a mailing on April 1, 1997. These notices did not, however, provide the rules governing eligibility. *Id.* At ¶¶ 19-21.

Back in 1978, the biennial International Convention of the USWA passed an amendment to its Constitution that substantially modified its attendance requirement. *Id.* at ¶ 25. The USWA then notified all its members about the changes in its publication Steelabor, which is mailed free of charge to all members. *Id.* In addition, Local 1011 posted notices of the changes in all plant entrances and union bulletin boards in 1978. *Id.* The majority of Local 1011's membership of April 1997 had worked in the plant since before 1978, and the attendance rule has not changed since then. *Id.*

The meeting attendance rule may be found today in the USWA Constitution and a USWA publication entitled "Local Union Elections Manual." *Id.* at ¶ 22. Copies of these documents are available upon request and free of charge both at Local 1011's headquarters in East Chicago, Indiana, and the USWA District Office in Gary, Indiana. *Id.* at ¶ 23. Between the 1994 and 1997 elections, Local 1011 never withheld any requested information regarding the attendance rule nor distributed any special notices to the membership concerning the rule. *Id.* at ¶ 24.

To administer the excuse provision of the attendance requirement, Local 1011 consults employer records to determine whether a nominee who has attended fewer than

eight meetings was working during a sufficient number of meetings to qualify for office. *Id.* at ¶ 26. By this means, one of the nominees was found eligible to run for office despite attending only seven meetings; another qualified despite attending only four meetings. *Id.* The excuse provision also allowed members to be excused based on sickness without written documentation, so long as the employee reported off from work sick on the day that a union meeting was held. *Id.* Because Local 1011 cannot verify other permissible excuses independently, it requires a member to submit written documentation to verify an excuse for jury duty, a death in the family, or military service. *Id.*

DISCUSSION

The standards that generally govern summary judgment motions are familiar. Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper only if it is demonstrated that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Nebraska v. Wyoming*, 507 U.S. 584, 590, 113 S.Ct. 1689, 123 L.Ed.2d 317 (1993); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322- 23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In other words, the record must reveal that no reasonable jury could find for the nonmovant. *Karazanos v. Navistar Int'l Transp. Corp.*, 948 F.2d 332, 335 (7th Cir.1991); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In deciding a motion for summary judgment, a court must view all facts in the light most favorable to the nonmovant. Anderson, 477 U.S. at 255, 106 S.Ct. 2505; *NUCOR Corp. v. Aceros Y Maquilas de Occidente*, 28 F.3d 572, 583 (7th Cir.1994).

The Hotel Employees and Steelworkers Cases

Section 401(e) of the LMRDA, that is, 29 U.S.C. § 481(e), provides in pertinent part:

In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to . . . reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof.

In *Wirtz v. Hotel, Motel,* and *Club Employees Union, Local 6,* 391 U.S. 492, 88 S.Ct. 1743, 20 L.Ed.2d 763 (1968) (hereinafter "Hotel Employees "), the Supreme Court began to formulate the themes that would recur in cases alleging violations of this statute. In that opinion, the Court addressed a union bylaw which limited candidates for the major elective offices to union members who held or previously had held some elective office. The Court stated that Congress did not intend the authorization of "reasonable qualifications uniformly imposed" to be given a broad reach. 391 U.S. at 499, 88 S.Ct. at 1748. "The check of democratic elections as a preventive measure is seriously impaired by candidacy qualifications which substantially deplete the ranks of those who might run in opposition to incumbents." *Id.* The Court concluded, "Plainly, given the objective of Title IV, a candidacy limitation which renders 93% of union members ineligible for office can hardly be a 'reasonable qualification,' " and remanded the case to the district court with instructions to order a new election under the Secretary of Labor's supervision. *Id.* at 502, 88 S.Ct. at 1749.

Local 3489, United Steelworkers of America, AFL-CIO v. Usery, 429 U.S. 305, 97 S.Ct. 611, 50 L.Ed.2d 502 (1977) (hereinafter "Steelworkers ") is the controlling Supreme Court case for the controversy before this Court. In Steelworkers, the Supreme Court dealt with a provision in the union constitution limiting eligibility to members who had

attended at least one-half of the local's regular meetings for three years previous to the election of officers. Relying on *Hotel Employees*, and also *Wirtz v. Glass Bottle Blowers Ass'n.*, 389 U.S. 463, 88 S.Ct. 643, 19 L.Ed.2d 705 (1968), and *Wirtz v. Local 125, Laborers' Intern. Union of North America, AFL-CIO*, 389 U.S. 477, 88 S.Ct. 639, 19 L.Ed.2d 716 (1968), the Court also found this requirement was unreasonable under the LMRDA. "The basic objective of Title IV of the LMRDA is to guarantee 'free and democratic' union elections modeled on 'political elections in this country' where 'the assumption is that voters will exercise common sense and judgment in casting their ballots.' " 429 U.S. at 309, 97 S.Ct. at 614 (quoting Hotel Employees, 391 U.S. at 504, 88 S.Ct. at 1748). The Court maintained that the purpose of Title IV transcended the right of an individual union member to run for a particular office, and concerned the rights of all members to participate fully in the operation of their union through democratic processes responsive to the membership. *Id.* (citing *Bottle Blowers*, 389 U.S. at 475, 88 S.Ct. at 650; *Local 125*, 389 U.S. at 483, 88 S.Ct. at 642; and *Hotel Employees*, 391 U.S., at 497, 88 S.Ct. at 1747).

The attendance requirement in *Steelworkers* excluded 96.5% of the union membership from candidacy. On this basis, the Supreme Court, echoing the language of *Hotel Employees*, found that the provision "hardly seem[ed] to be a 'reasonable qualification' consistent with the goal of free and democratic elections." 429 U.S. at 310, 97 S.Ct. at 615. The defendant union, however, tried to distinguish an attendance requirement from the requirement which the Court had rejected in *Hotel Employees*, that is, a requirement of previously holding elective office. Whereas, the union argued, a union member subject to the requirement of *Hotel Employees* could not assure eligibility by the member's own efforts, the union member in *Steelworker* could do so by simply attending eighteen brief meetings over a three-year

period, not an onerous burden. *Id.* The Court rejected this distinction, noting that the union member in *Steelworkers* would have to start attending meetings at least eighteen months in advance of an election in order to be eligible to run. 429 U.S. at 311, 97 S.Ct. at 615. Such a requirement, the Court reasoned, would probably discourage broad participation since it is unlikely that the issues which might prompt potential candidates to run would be evident so far in advance of the elections. *Id.*

Steelworkers made it clear that an attendance requirement which excluded 96.5% of union membership from candidacy and required members to decide to qualify themselves eighteen months in advance of an election violated section 401(e) of the LMRDA. The Court, however, declined to adopt a per se "effects" standard or analysis, though the dissent claimed the majority came close to doing so. 429 U.S. at 315, 97 S.Ct. at 617. Rather, the Court endorsed a flexible rule under which courts would consider several factors in deciding whether an attendance requirement disqualifying a high percentage of the membership from candidacy was reasonable, including union interests that would justify or balance such a result. 429 U.S. at 313, 97 S.Ct. at 616-17. This Court has already noted above that the Supreme Court considered the length of time needed to qualify under the union's attendance requirement. The Supreme Court in *Steelworkers* also considered, but was not persuaded by, the union's justifications. To the argument that the attendance requirement was reasonable because it served to encourage better attendance at union meetings, the Court noted the evident failure of the requirement to achieve that objective. 429 U.S. at 312, 97 S.Ct. at 615. To the argument that the requirement assured that only knowledgeable candidates who had attended meetings would be elected, the Court maintained that "the provisions of the LMRDA express a congressional determination that the best means to this end is to leave the

choice of leaders to the membership in open democratic elections, unfettered by arbitrary exclusions." *Id.*

Deference Owed To 29 C.F.R. § 452.38, n. 25

The lack of a per se standard has, to some extent, relegated unions to guessing at what attendance requirements the courts would permit. The current USWA attendance rule under consideration in this case requires candidates to attend one-third of the monthly union meetings during the 24-month period previous to a union election. This would oblige potential candidates to start attending meetings at least eight months in advance of the elections. In the April 1997 elections, this rule excluded 96.83% of the membership before its excuse provision was taken into account. After applying the excuse provision, 92% of the membership would still have been barred from running.

Local 1011 notes that back in 1978, just after the *Steelworkers* decision, the Department of Labor reviewed the current USWA attendance rule under its interpretative regulations. Def.'s Mem. at 21. The Department of Labor provided an official statement to the USWA indicating that its rule "would be regarded as reasonable within the guidelines even if its application resulted in the disqualification of a high proportion of the membership." *Id.* (quoting Ex. B to Marshall Dec. at 1). Local 1011 notes that 29 C.F.R. § 452.36 sets forth a variety of factors to be considered in assessing the reasonableness of a qualification for union office, such as "the relationship of the qualification to the legitimate needs and interests of the union," the "relationship of the qualification to the demands of union office," etc. Def.'s Mem. at 21-22. 29 C.F.R. § 452.38(a) sets forth factors which deal specifically with meeting attendance requirements, and provides as follows:

> [The reasonableness of an attendance requirement] must be gauged in the light of all the circumstances of the

> particular case, including not only the frequency of meetings, the number of meetings which must be attended and the period of time over which the requirement extends, but also such factors as the nature, availability and extent of excuse provisions, whether all or most members have the opportunity to attend meetings, and the impact of the rule, i.e., the number or percentage of members who would be rendered ineligible by its application.

Local 1011 quotes these regulations to buttress its position that the long-standing policy of the Department of Labor, based on *Steelworkers*, has been to apply a multi-factor test in determining whether an attendance requirement is reasonable, and not to decide the matter exclusively on the basis of what proportion of the membership such a requirement would exclude.

Initially, the Union understood the Secretary was alleging Local 1011's attendance rule to be in violation of the LMRDA on the basis of its high rate of exclusion in combination with inadequate notice of the requirement among union members. Def.'s Mem. at 21. However, the Secretary made it clear in her reply that "[her] case is predicated entirely on the fact that, even with a liberal excuse provision, 92 percent of the members of Local 1011 were barred from running for office." Pl.'s Reply at 3. The Secretary argued that rule-making and case law subsequent to the correspondence and rules cited by Local 1011 lend support to her position. *Id.* The cornerstone of the Secretary's case is *Doyle v. Brock*, 821 F.2d 778 (D.C. Cir.1987), where the D.C. Circuit found arbitrary and capricious the Secretary of Labor's decision not to challenge a union bylaw which required a candidate for office to attend at least half of the union meetings in the twelve months preceding the election. In reaching that conclusion, the D.C. Circuit held that the impact of an attendance requirement which disqualified 97% of the union's

membership from candidacy was by itself sufficient to make the requirement unreasonable. "There is no basis, in *Steelworkers* or in any other case, for the notion that an attendance requirement that has a large antidemocratic effect can be reasonable on its face, and that some additional factor is necessary to find the requirement violative of the LMRDA." 821 F.2d at 784.

In reaction to this decision, the Department of Labor embarked upon its formal rule-making procedure which resulted in the adoption of the following language in a footnote to Rule 452.38 on November 14, 1995, well before the Local 1011 election under discussion:

> If a meeting attendance requirement disqualifies a large portion of members from candidacy, that large antidemocratic effect alone may be sufficient to render the requirement unreasonable. In *Doyle v. Brock*, 821 F.2d 778 (D.C. Cir.1987), the court held that the impact of a meeting attendance requirement which disqualified 97% of the union's membership from candidacy was by itself sufficient to make the requirement unreasonable notwithstanding any of the other factors set forth in 29 C.F.R. § 452.38(a).

29 C.F.R. § 452.38 n. 25. The Secretary argues that this language provides, in effect, "an inverse relationship between the percentage of members disqualified and the reasonableness of a rule . . . There can be no question that the rationale of the letter issued to the Steelworkers has been superseded by this formal rulemaking procedure." Pl.'s Reply at 9. The Seventh Circuit has apparently not decided whether it agrees with the Department's footnote indicating, in light of Doyle, that a union attendance requirement may be found

unreasonable under the LMRDA solely on the basis of the extent to which it excludes union members. [1]

In response to the Secretary's explication of case law and regulatory authorities, Local 1011 elaborates upon the deference this Court ought to extend to the Secretary's current policy. The Union cites *Atchison Topeka and Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 442 (7th Cir.1994) (en banc) aff'd on other issues 516 U.S. 152, 116 S.Ct. 595, 133 L.Ed.2d 535 (1996), where the Seventh Circuit reviewed a regulation which the Federal Railroad Administration (the "FRA") had published in acquiescence to the Ninth Circuit's rejection of the FRA's previous regulation as an unreasonable interpretation of the governing statute. Def.'s Reply at 5-6. The Seventh Circuit distinguished between administrative agency rules adopted pursuant to a statute that contains a delegation of rule-making authority from Congress to the agency, and,

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[1] In *Donovan v. Illinois Ed. Ass'n*, 667 F.2d 638 (7th Cir.1982), the Seventh Circuit addressed a union bylaw which guaranteed 8% of the seats in the union's Representative Assembly to minority groups. In considering the antidemocratic effect of the bylaw, Judge Posner remarked, "We have found no recent decision upholding a candidacy qualification that excluded a majority of the union's membership, however reasonable the qualification may have seemed." *Id.* at 641. However, the panel did not find the bylaw unreasonable on this basis alone, but also considered the likelihood that the bylaw would perpetuate incumbency, the vagueness of the union's justification for the rule, the lack of information about the actual racial and ethnic composition of the union, and the lack of correlation between the minorities that might be assigned these seats and the racial and ethnic make-up of the students taught in the Illinois public schools.

In *Reich v. Local 1, American Postal Workers' Union, AFL-CIO*, 1994 WL 110610 (N.D.Ill. March 31, 1994), a District court within the Seventh Circuit referred to the holding in Doyle but did not come to a conclusion about its merits.

so-called "interpretive rules" that an agency adopts pursuant to its inherent authority to make known its interpretation of the statutes the agency is charged with administering. *Atchison Topeka*, 44 F.3d at 441-42. Only the former, the court held, are entitled to the high degree of deference accorded in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). 44 F.3d at 441. The Seventh Circuit went on to hold that, although an interpretive rule is normally entitled to a moderate degree of deference from the courts, that deference (1) diminishes when the rule is the product of a change from a prior longstanding interpretation; and (2) disappears altogether when the agency has adopted its new interpretation solely because a court has disapproved of the agency's prior interpretation. 44 F.3d at 442-43. The court further stated:

> Any deference that we might confer upon an agency interpretation of a statute must be to the agency's diligent study of the statute and the underlying activity it seeks to regulate. Here, however, the FRA is essentially asking that we defer to the Ninth Circuit's interpretation of the Act. . . . And while we carefully consider the opinions of our sister circuits, we certainly do not defer to them. . . . Our duty is to independently decide our own cases, which sometimes results in disagreements with decisions of other circuits.

Id. at 443 (citations omitted). Judge Easterbrook, in a concurring opinion joined by Chief Judge Posner and Judge Manion, fully agreed with the majority and added that since courts do not defer to agencies when agencies decide not to acquiesce to a judicial decision, fairness to the private parties who are affected by agency actions dictates that the courts likewise should not defer to agency decisions in favor of acquiescence. *Id.* at 444.

In explaining why she modified the policy of the Department by adding the language quoted above, the Secretary said the following in the Federal Record:

> Several labor organizations stated in their comments that they disagreed with Doyle and recommended that Doyle not be followed in other circuits. However, this recommendation is not feasible. Since Doyle was decided in the District of Columbia Circuit, where the Secretary is located, and since ... any member may bring litigation against the Secretary for judicial review of his decision not to take enforcement action, a decision by the Secretary not to follow Doyle in another circuit would be susceptible to successful legal challenge in the D.C. Circuit.

60 F.R. 26390 (May 17, 1995); Pl.'s Reply, Ex. C. As Local 1011 points out, in explaining her acquiescence to the appellate court, the Secretary did not indicate that she agreed with Doyle's reasoning. Noting, instead, that the D.C. Circuit would have jurisdiction and venue for actions against the Secretary, the Secretary indicated it would not be "feasible" for her to defend decisions not in conformity with Doyle, since all such cases could be brought in the D.C. Circuit and the Secretary would be bound to lose every time given that court's decision in Doyle. The lack of substance inhering in the Secretary's explanation suggests that agency expertise had little to do with this change in policy. Consequently, the new rule is not entitled to the deference a court normally accords to policy predicated on agency expertise. The authority for this rule, then, boils down to the D.C. Circuit's opinion in Doyle, which, for a district court sitting in the Seventh Circuit, is persuasive but not controlling authority.

There Is No Per Se Test

Among opinions which have addressed the issue of union attendance requirements, Doyle is unique in holding that a

union attendance requirement may be found unreasonable under the LMRDA on account of its exclusivity alone. Local 1011 is correct in observing that all the other courts which have struck down attendance requirements have invariably cited some other factor or factors in reaching this result. Def.'s Reply at 13. One factor the courts have almost always discussed is the length of time previous to the elections that would be necessary to attend the meetings required for eligibility. For example, in *Marshall v. Local 1402, Intern. Longshoremen's Ass'n of Tampa, Fla. and Vicinity AFL-CIO*, 617 F.2d 96 (5th Cir.1980), *cert. denied*, 449 U.S. 869, 101 S.Ct. 205, 66 L.Ed.2d 88 (1980), which the Secretary cites because it emphasized the presumed unreasonableness of a requirement that excluded 93.7% of the membership, the court nevertheless discussed the effect of a ten-month period needed to qualify, stating that the concern for eliminating potential candidates whose interest in running may be aroused too late to comply with qualifying procedures "is operative in this case." *Id.* at 99. In *Herman v. Local Lodge 197, Intern. Broth. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO*, 976 F.Supp. 129 (N.D.N.Y.1997), another case cited by the Secretary, the attendance rule excluded 87% of the membership, but in finding the requirement unreasonable, the court also considered the effect of the fifteen-month advance period imposed by the requirement. 976 F.Supp. at 134.

In emphasizing the percentage of membership excluded as the basis of her case, the Secretary states, "We have been unable to locate a single case where the court has upheld a rule, regardless of the asserted purpose and justification, where the number of members barred by the rule approaches, much less exceeds, 90 percent." Reply at 10. An unpublished decision from the *District of Massachusetts, Herman* v. *Springfield Mass.* Area Local 497 APWU, No. 97-30202, slip op. (D.Mass. February 10, 1999), which had been entered

one week after the Secretary's final submission, changed this result.[2] In Local 497, the district court disagreed with the Secretary's position that the exclusivity of an attendance rule can per se render the attendance rule unreasonable. Relying on the Supreme Court's unwillingness to establish a per se "effects analysis" which could determine a bylaw to be unreasonable merely on the basis of percentage of members excluded, the district court held that an attendance rule's exclusion of 96% of the union membership was not by itself sufficient to establish the unreasonableness of that rule. Order attached to Def.'s Letter, at 11-12. The court, then, looked to other factors. One was the time needed to establish eligibility. *Id.* at 12-14. The rule in Local 497 required attendance at three monthly meetings over the previous year, so that a member only needed three months to qualify. *Id.* at 13. The court noted that 29 C.F.R. § 452.38(a) states, "It may be reasonable for a labor organization to establish a requirement of attendance at a specified number of its regular meetings during the period immediately preceding an election. . . ." *Id.* The district court also considered the number of meetings required and the excuse provision en route to concluding that the Local 497 attendance rule was reasonable. *Id.* at 14-17. As a result, the court granted the union summary judgment.

It is true that Local 497 does not address Doyle, but it is by no means certain that this would have made any difference. Noteworthy is the district court's consideration of the advance

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[2] Both parties wrote letters to the Court concerning this opinion. In an Order entered on March 31, 1999, the Court advised the parties of its preference that in such situations they file a leave to supplement rather than contact the Court by letter. The Court made the letters part of the official record and considered the arguments therein, the parties not objecting.

time needed to qualify, a factor which has been noted above in other opinions addressing union attendance requirements. The ultimate authority for considering this factor is the Supreme Court's Steelworkers opinion, where the Court found that a qualifying period of eighteen months was too long. 429 U.S. at 310-311, 97 S.Ct. at 615.

Local 1011 rightly recognizes the importance of the qualifying period in the determination of an attendance requirement's reasonableness. Def.'s Mem. at 34-36. The Supreme Court addressed this factor in response to the union's argument that an attendance requirement should be distinguished from the requirement of holding minor elective office which had been rejected in *Hotel Employees*. 429 U.S. at 310, 97 S.Ct. at 615. The union conceded that the *Hotel Employees* requirement might not have been within the control of a given union member, but argued that an attendance requirement was within the power of any member since all he or she need do is attend the requisite number of meetings. *Id.* The Supreme Court, however, rejected this argument, reasoning that potential candidates, motivated by the issues which usually emerge just before an election, would generally be unable to qualify when confronted with an attendance rule that required them to have begun to qualify long ago. 429 U.S. at 311, 97 S.Ct. at 615. An attendance requirement, then, which imposes such a long advance period, resembles the requirement in *Hotel Employees*, in that it effectively renders potential candidates powerless to qualify at the very time they are most likely to make decisions about running for union office. [3]

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[3] In some cases, unions have presented attendance requirements with fewer meetings than were required in *Steelworkers*, but with as long a qualifying period. Consider *Usery v. Local Division 1205, Amalgamated Transit Union*, 545 F.2d 1300 (1st Cir.1976), where the union required

This Court respectfully disagrees with the holding in Doyle, and finds that the proper interpretation of the Supreme Court's opinion in Steelworkers is that the unreasonableness of a attendance requirement does not depend per se on the percentage of the membership excluded, though this may be an important factor. In determining the reasonableness of an attendance requirement, there are other factors that a court should consider, particularly the amount of time a union member needs to qualify in advance of the election. The Court reaches this conclusion because the Supreme Court in *Steelworkers* made it clear it was not setting forth a per se rule, and because in finding the union rule unreasonable, the Supreme Court examined the factor of advance time needed to qualify as well as percentage of membership excluded. The Court also notes the following passage from *Steelworkers:*

> The reasons for leaderships becoming entrenched are difficult to isolate. The elections of the same officers year after year may be a signal that antidemocratic election rules have prevented an effective challenge to the regime, or might well signal only that the members are satisfied with their stewardship; if elections are uncontested, opposition factions may have been denied access to the ballot, or competing interests may have compromised differences before the election to maintain a front of unity. Conversely, turnover in offices may result from an open political process, or from a

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prospective candidates for office to attend six regular meetings each year during the twenty-four months prior to an election, which had the effect of requiring attendance for a period beginning eighteen months prior to an election. Though the requirement seems to reduce the burden by lessening the number of meetings, it maintains the amount of qualifying time, which is far more indicative of the restrictiveness of the requirement.

> competition limited to candidates who offer no real opposition to an entrenched establishment. But Congress did not saddle the courts with the duty to search out and remove improperly entrenched union leaderships. Rather, Congress chose to guarantee union democracy by regulating not the results of a union's electoral procedure, but the procedure itself. Congress decided that if the elections are "free and democratic," the members themselves are able to correct abuse of power by entrenched leadership. Procedures that unduly restrict free choice among candidates are forbidden without regard to their success or failure in maintaining corrupt leadership.

429 U.S. at 311, 97 S.Ct. at 615-16. This Court acknowledges that here the Supreme Court was mostly concerned with "results" in regard to the union officers actually elected rather than in regard to the proportion of union members excluded as candidates. In this passage, however, the Supreme Court does entertain the possibility that entrenched leadership may simply be the choice of union membership. The same may be said for low participation rates in union elections. Local 1011's point is well-taken, that it is likely the vast majority of union members choose not to run for union office for the same reason the vast majority of Americans choose not to run for political office, not because of limitations imposed by a requirement, but as a matter of choice. Def.'s Mem. at 32. The record indicates that only 424 union members out of 2990 attended even one of the meetings, so that even if Local 1011 had an attendance requirement of but one meeting, 86% of the membership would have been excluded. It is because of the possibility that 90% of union membership might never take an interest in union office, regardless of candidacy requirements, that courts should not focus uniquely upon the failure of this 90% to meet candidacy requirements, but should identify some other factor or factors which unduly

burden the decision to run in the elections. As the Supreme Court indicates, the role of the courts is to assure that the union's electoral procedures are free and democratic, so that union members have an unfettered opportunity to participate as candidates, which they can accept or reject as they wish.

The Eight-Months Factor

In the instant case, the attendance rule not only excluded 92% of the membership, but also imposed a period of at least eight months in which to qualify. Is this too long? Local 1011 states, "Doyle is the only case in which a meeting attendance rule with a qualifying period of eight months or less was found unreasonable because of its percentage 'effect.' " Def.'s Reply at 13. For her part, the Secretary notes that courts have made it clear "that periods of ten or twelve months are prohibited," and adds, "we are unaware of any court which has found shorter periods of time permissible where a significant portion of the membership is barred from office." Pl.'s Reply at 12. In referring to courts which have found "periods of ten" months unreasonable, the Secretary may have had in mind *Marshall v. Local 1402*, cited above, which found a ten-month qualifying period accompanying a 93.7% exclusion rate, unreasonable. But there are cases which have found six months unreasonable. *Marshall v. Millwrights Local Union No.1914, United Brotherhood of Carpenters and Joiners of America*, 1981 WL 27201 (D.Ariz.1981), addressed a union attendance rule which required members to attend at least half of the monthly membership meetings during the twelve months preceding nomination in order to be eligible for local union office, with no excuses allowed for any reason. *Id.* at *3. The rule rendered approximately 80% of those union members who were not disqualified by other bylaws ineligible, and the qualifying period would apparently have been six months. *Id.* at *6. The court found, "The imposition by Local 1914 of a rule requiring members to attend at least fifty percent (50%) of the membership

meetings during the twelve months preceding nominations to be eligible to be candidates for office, is unreasonable and a violation of § 401(e) of the Act (29 U.S.C. § 481(e))." *Id.* There is also the Doyle decision, where the D.C. Circuit considered an attendance requirement of 50% of monthly union meetings over twelve months resulting in the exclusion of 97% of the membership to be unreasonable. Of course, the D.C. Circuit reached this conclusion on the basis of the exclusion rate alone. Nevertheless the Doyle case is noteworthy as a rejection of an attendance requirement that had a six-month qualification period. In contrast to these cases, Local 497, found three months to be reasonable despite the exclusion of 96% of the union membership.

The case law, then, appears to indicate that where a union attendance requirement excludes a high percentage of the membership (close to or above 90%), a qualification period requiring three months or less may be reasonable, while one requiring six months or more will not be reasonable. This indication would place the eight-month qualifying period of the instant case outside the realm of reasonableness, given the exclusion of 92% of the union membership that the attendance requirement entailed.

Local 1011 points to the Declaration of former Department of Labor Secretary Marshall, ¶ 18, which states, "It is reasonable to expect that most members' views about the incumbents' performance will have ripened and that the campaign issues will have taken shape by [the eight months before a triennial election]." However, aside from simply making this statement, the former Secretary of Labor does not provide much evidentiary support or explanation as to why eight months is reasonable. It is surely the case that issues and interest in a union election are likely to intensify, and union members likely to give greater consideration to running for office, as the time of election approaches. If that is true, then the shorter the qualifying period imposed by an attendance

requirement, the more likely that requirement is reasonable, regardless of its effect, as long as there are no other factors that unreasonably exclude union members. The Court believes that eight months to qualify in advance of an election to be a long period to impose upon union members especially when it results in the exclusion of a high percentage of the membership. An attendance requirement that would permit members to decide about running well within six months of the election would appear to give them sufficient opportunity to make this decision on the basis of the issues that would be relevant to that election.

Other Factors

Local 1011 attempts to bring some of the other factors listed in 29 C.F.R. §§ 452.36 and 452.38 to bear on the determination of whether its attendance rule is reasonable. Section 452.36(b)(4) provides that a qualification ought to be assessed by comparing it with the requirements for holding office generally prescribed by other labor organizations. The local union points out that before the Department of Labor approved the USWA's revised meeting attendance rule, it had conducted a survey of labor organizations and had found the revised rule congruent with the meeting attendance rules found in other labor organizations. Marshall Dec. at ¶ 22; Def.'s Mem. at 26-27. However, what may have been typical, reasonable, and acceptable at that time might not be today. The case law indicates that courts have become more severe in their standard of reasonableness over the years. Though Local 1011's current attendance rule may have been typical of rules other labor organizations had in the past, case law indicates courts do not consider it reasonable today.

29 C.F.R. § 452.38(a) provides that the reasonableness of a qualification must be gauged in the light of all the circumstances of the particular case, "including the number of meetings which must be attended and the period of time over

which the requirement extends, [and] whether all or most members have the opportunity to attend meetings." Local 1011 argues that the burden of attending eight union meetings over two years is not great. Def.'s Mem. at 28. However, the Supreme Court pointedly stated in *Steelworkers*, "We must judge the eligibility rule not by the burden it imposes on the individual candidate, but by its effect on free and democratic processes of union government." 429 U.S. at 310-11 n. 6, 97 S.Ct. at 615 n. 6. This Court agrees with Local 1011 that its attendance rule imposes no great burden on its members in terms of the number, hours, and accessibility of the union meetings. But the requirement does impose a burden on the democratic process. This Court has maintained above that not only the exclusivity of the attendance rule, but also the length of time needed to qualify under the rule are the most important factors in respect to assessing the rule's effect on the union's voting process. With respect to the democratic process, these factors outweigh the burden in terms of hours and accessibility that the requirement may place on union members.

29 C.F.R. § 452.38 also indicates that reasonableness depends on "the nature, availability and extent of the excuse provisions." Local 1011 argues at length for the reasonableness of the excuse provision of its rule. Def.'s Mem. at 27-29. Again, the union does not need to persuade the Court as to the reasonableness of the excuse provision. However, despite the liberality of an excuse provision that allowed fifty-three union members to qualify who had not attended a single meeting, the fact remains that the excuse provision did not reduce the percentage of union members excluded by the rule below 92%. Furthermore, the excuse provision did nothing to reduce the amount of time generally necessary for a union member to qualify to run as a candidate: eight months. The excuse provision may have had more relevance in the case of an attendance requirement that did

not exclude such a high proportion of union members or did not impose so long a period of time for qualification. In this case, however, because of the extreme effects of the attendance requirement, the reasonableness of the excuse provision does not diminish the unreasonableness of that requirement.

The Union's Interests

As noted above, the Supreme Court in *Steelworkers* considered whether the union had legitimate interests that would justify the antidemocratic effect of its attendance rule. 429 U.S. at 310, 97 S.Ct. at 615. Even Doyle, relying on *Steelworkers*, states, "[T]he only way to justify a requirement that has a large antidemocratic effect is to show that the requirement serves valid union interests." 821 F.2d at 785. Local 1011, then, raises the interests which, the union insists, justify the effects of the attendance rule. Quoting the Declaration of former Secretary of Labor Marshall, Local 1011 claims the rule "help[s] to insure broad-based attendance at local union meetings, i.e., attendance by those who oppose as well as those who support the incumbent officers." Marshall Dec. at ¶ 15; Defendant's Mem. at 22. However, with only 3% of the membership qualifying outright for the elections through their attendance, it is clear that the rule has failed to achieve this objective. The Supreme Court made much the same point when addressing a similar justification in *Steelworkers*, "[T]he rule has plainly not served these goals. It has obviously done little to encourage attendance at meetings, which continue to attract only a handful of members." 429 U.S. at 312, 97 S.Ct. at 616.

Local 1011 also argues that the attendance rule "ensure[s] that persons who hold positions of responsibility and trust in a local union have a demonstrated interest in, and commitment to, the local union in question." Marshall Dec. at ¶ 12; Def.'s Mem. a 25. And a third union interest provided by the local

union is that of "ensur[ing] that candidates have participated in the affairs of the union and are therefore more likely to be familiar with its problems when they become officers." *Id.* The Secretary's response to the arguments predicated on these interests is that the union membership itself should decide whether candidates have sufficiently demonstrated interest and commitment to the local union or have sufficiently participated in its affairs and are sufficiently familiar with its problems to hold office. Pl.'s Reply at 13. The Supreme Court had the same reaction to these justifications in *Steelworkers:* "As for assuring the election of knowledgeable and dedicated leaders, the election provisions of the LMRDA express a congressional determination that the best means to this end is to leave the choice of leaders to the membership in open democratic elections, unfettered by arbitrary exclusions." 429 U.S. at 312, 97 S.Ct. at 616.

The Requirement "May Have Affected" the Elections

Under section 402(c) of the LMRDA (29 U.S.C. § 482(c)), a court may order a new election only if it finds the violation "may have affected" the outcome of the previous election. The Secretary argues that in *Hotel Employees*, the Supreme Court interpreted the legislative history of the Act to indicate that Congress intended a proved violation to have the effect of establishing a prima facie case that can be met only "by evidence which supports a finding that the violation did not affect the result." Pl.'s Mem. at 16 (quoting *Hotel Employees,* 391 U.S. at 507, 88 S.Ct. at 1752). Furthermore, the Supreme Court noted that the exclusion of a large percentage of the membership made it "impossible to know that the election would not have attracted many more candidates but for the bylaw." 391 U.S. at 508, 88 S.Ct. at 1752-53.

Local 1011 argues that the Supreme Court in *Steelworkers* did not seek to free from the burden of restrictive requirements all union members regardless of whether they

wanted to run for office or not. Rather, the Court sought to protect only those union members who were seriously interested in running for office but were deterred by those requirements. Pl.'s Mem. at 31-34. The union believes it is fatal to the Secretary's case that she does not convincingly identify any union member who would have run had it not been for the rule. Def.'s Mem. at 6-9, 31-34. The Secretary responds with more case law indicating that this does not matter. Pl.'s Reply at 14-16. In *Donovan v. Local 223, Motor Expressmen's Union of the National Federation of Independent Unions*, 1982 WL 1167 (W.D.Okla.1982), for example, no union member who was nominated as a candidate was expressly denied the right to be a candidate for office because of the challenged qualifications rule. "However, the Court [found] that the number of potential candidates was so far reduced by the qualifications imposed that potential winning candidates may have decided not to run for union office by reason of the challenged candidacy requirements." *Id.* at * 5. Likewise the Supreme Court in *Wirtz*, 389 U.S. at 483, 88 S.Ct. at 642, stated:

> The Act was not designed merely to protect the right of a union member to run for a particular office in a particular election. Title IV's special function in furthering the general goals of the LMRDA is to insure free and democratic elections, the regulations of the union electoral process enacted in the Title have been regarded as necessary protections of the public interest as well as the right and interests of union members.

In the instant case, the percentage of union members excluded was very large, 92%. It is impossible to know that none of them would have run for union offices and won were it not for the discouraging effects of the meeting attendance rule which potential candidates had to start meeting at least eight months in advance of the elections. The Court finds that the

violation may have affected the outcome of the union's April 1997 election of officers.

The Remedy

The Court may declare an election void and direct a new election under the direction of the Secretary if a § 401(e) violation has occurred that may have affected the outcome of the election. [4] Such relief is proper on a motion for summary judgment. *Usery v. Intern. Org. of Masters, Mates & Pilots*, 538 F.2d 946, 949 n. 5 (2d Cir.1976). Having found a violation of section 401(e) of the LMRDA that may have affected the outcome of the election, this Court declares the previous election void and orders a new election under the direction of the Secretary.

CONCLUSION

For the foregoing reasons, the Plaintiff's Motion for Summary Judgment is GRANTED, the Defendant's Motion for Summary Judgment is DENIED, the Court DECLARES VOID the Local 1011 election, and the Court ORDERS a new election under the direction of the Secretary.

Furthermore, it is ORDERED that the parties shall have ten days from the date of this order to report whether further judicial proceedings are necessary in this case. If no party reports that further judicial proceedings are necessary, the Court will enter final judgment consistent with the present ruling.

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[4] 29 U.S.C. § 482(c) provides in pertinent part, "If, upon a preponderance of the evidence after a trial upon the merits, the court finds . . . that the violation of section 481 of this title may have affected the outcome of an election, the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization."

Supreme Court, U.S.
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No. 00-129

In the Supreme Court of the United States

LOCAL 1011, UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC, PETITIONER

v.

ALEXIS HERMAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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22 pp

QUESTION PRESENTED

Whether a rule restricting candidacy for union office to union members who have attended eight monthly meetings during the two-year period preceding nominations (or have been excused from attendance) is a reasonable qualification for candidacy under Section 401(e) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 481(e).

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In the Supreme Court of the United States

No. 00-129

LOCAL 1011, UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC, PETITIONER

v.

ALEXIS HERMAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 207 F.3d 924. The opinion of the district court (Pet. App. 9a-35a) is reported at 59 F. Supp. 2d 770.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2000. On June 12, 2000, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including July 21, 2000, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA or Act), 29 U.S.C. 481 *et seq.*, prescribes requirements governing the election of officers of labor organizations. Every local labor organization covered by the Act is required to conduct, at least once every three years, an election of its officers by secret ballot among its members in good standing. 29 U.S.C. 481(b). Section 401(e) of the Act further provides that:

> a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed).

29 U.S.C. 481(e).[1]

2. Petitioner Local 1011, United Steelworkers of America, is a labor organization covered by the LMRDA. Pet. App. 10a. Chartered by and subordinate to the United Steelworkers of America, AFL-CIO (the International), petitioner is subject to the International's constitution, which provides that, in order to be eligible for election as a local officer, a member shall have attended at least one-third of the regular meetings of the local during the 24-month period preceding the election. *Id.* at 10a-11a. Because meetings are held on a monthly basis, the rule requires members to have attended eight of 24 meetings during that period. A member's absence from a meeting may be excused if it is due to his or her union activities, working hours,

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[1] Section 504 of the Act, 29 U.S.C. 504, which disqualifies from union office persons convicted of certain offenses, is not at issue in this case.

service in the armed forces, confining sickness, or jury duty. *Ibid.* If a member has one or more excused absences, however, the member must have attended one-third of the meetings from which he or she was not excused. *Id.* at 4a, 10a-11a.

In April 1997, petitioner conducted an election governed by the constitution's meeting-attendance rule. Pet. App. 10a. At the time of the election, petitioner had 2990 members in good standing. *Id.* at 11a. Only 95 members (3.1%) had attended eight or more of the 24 monthly meetings in the two-year period preceding the election. *Ibid.* Even after consideration of the rule's excuse provision, only 242 members (8%) were eligible for nomination. *Ibid.*

After unsuccessfully protesting the election to petitioner and the International, two union members filed complaints with respondent Secretary of Labor in which they alleged that the meeting-attendance rule was not a reasonable candidacy qualification under Section 401(e) of the LMRDA. Pet. App. 11a-12a; see 29 U.S.C. 482(a). The Secretary found probable cause to believe that petitioner had violated the Act by maintaining the meeting-attendance rule. Pet. App. 12a.

3. The Secretary then brought this action against petitioner under Section 402(b) of the LMRDA, 29 U.S.C. 482(b), to set aside the election on the ground that petitioner had imposed an unreasonable qualification for candidacy—the meeting-attendance rule—and that that violation of Section 401(e) may have affected the outcome of the election. See 29 U.S.C. 482(c). The district court granted summary judgment in favor of the Secretary. Pet. App. 9a-35a.

Relying on *Local 3489, United Steelworkers* v. *Usery* (*Steelworkers*), 429 U.S. 305 (1977), in which this Court invalidated the International's previous rule requiring

attendance at one-half of the monthly meetings over three years, the district court held that the reasonableness of the meeting-attendance requirement should be evaluated under a multi-factor test.[2] The district court therefore considered the percentage of union members whose candidacy was excluded by the rule (92%), how far in advance of nominations a candidate would be required to begin attending meetings in order to qualify (eight months), and petitioner's justifications for the rule. Pet. App. 16a, 25a-28a. The court concluded that, despite its excuse provisions, the rule imposed a substantial burden on the democratic process by requiring prospective candidates to begin attending meetings eight months in advance of nominations. The court held that petitioner's interests in encouraging attendance at its meetings and having candidates with demonstrated commitment and knowledge about union affairs did not justify the rule's anti-democratic effect, because the rule had not encouraged attendance, and the electorate could itself judge the commitment and knowledge of the candidates. *Id.* at 32a-33a.

4. The court of appeals affirmed. Pet. App. 1a-8a. The court agreed with the district court that the percentage of union members disqualified by the rule was not dispositive of its reasonableness, and that a footnote in the Secretary's interpretive regulations, 29 C.F.R. 452.38(a) n.25, that suggested a per se test based on that percentage was entitled to little weight. Pet. App.

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[2] The district court declined to accord deference to the Secretary's position that the high exclusion rate was determinative because her interpretation was not based on application of her expertise but rather on acquiescence in the decision in *Doyle* v. *Brock*, 821 F.2d 778 (D.C. Cir. 1987), which the court believed misinterpreted *Steelworkers*. Pet. App. 22a, 26a.

5a-6a (relying in part on *Herman* v. *Springfield Mass. Area, Local 497, American Postal Workers Union* (*Postal Workers*), 201 F.3d 1, 4 (1st Cir. 2000) (rejecting per se test based on percentage of membership disqualified because that percentage may reflect member apathy as well as burden imposed by meeting-attendance rule)).

Citing *Steelworkers* and subsequent decisions of the courts of appeals (including those on which petitioner relies), the court articulated a standard for evaluating meeting-attendance requirements that it believed was "consistent with the case law." Pet. App. 6a. Under that approach, a condition of eligibility that disqualifies the vast bulk of the union's membership from standing for union office is presumed unreasonable. *Ibid.* The union must "then present convincing reasons, not merely conjectures, why the condition is either not burdensome or though burdensome is supported by compelling need." *Ibid.* The court concluded that this approach appropriately distinguishes, as did the First Circuit in *Postal Workers*, between a rule's impact (which may merely reflect members' apathy) and its burden. *Ibid.*

Applying that standard, the court concluded that the petitioner had not established a lack of burden:

> Requiring attendance at eight meetings in two years imposes a burden because it compels the prospective candidate not only to sacrifice what may be scarce free time to sit through eight meetings, but also, if he is disinclined to attend meetings for

> any reason other than to be able to run for union office, to make up his mind whether to run many months before the election.

Pet. App. 7a. The court further concluded that petitioner had not satisfied the "onus of justification" that the rule was supported by compelling need. *Ibid.* The court held that the slight turnout at meetings demonstrates that the rule had not been successful in bolstering attendance by persons who might want to run for union office in opposition to incumbents. *Ibid.* Furthermore, the court noted that the union had apparently given no consideration to other inducements to attend meetings, and that petitioner had made no argument that a three-meeting rule, like that approved in *Postal Workers*, which would provide a longer window of opportunity to decide on candidacy, would fail to satisfy the union's desire to have experienced and committed officers. *Id.* at 7a-8a.

ARGUMENT

The decision of the court of appeals correctly concludes that petitioner's meeting-attendance rule is not a reasonable qualification for candidacy for union office under Section 401(e) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 481(e). The decision does not conflict with any decision of this Court or any other court of appeals. To the extent there is tension among the courts of appeals regarding the appropriate analysis for determining the reasonableness of meeting-attendance rules, this case is not a suitable one in which to resolve the tension. This Court's review is therefore not warranted.

1. Section 401(e) of the LMRDA guarantees union members in good standing the right to be candidates for union office, subject only to "reasonable qualifications

uniformly imposed." 29 U.S.C. 481(e). Petitioner contends (Pet. 17-18) that the court of appeals adopted an "entirely novel" and unsupported approach in determining whether petitioner's meeting-attendance requirement is a reasonable qualification under Section 401(e). Contrary to that contention, the approach of the court of appeals is supported by this Court's seminal decision on the issue, *Local 3489, United Steelworkers* v. *Usery* (*Steelworkers*), 429 U.S. 305, 310 (1977), in which the Court held that a prior version of the meeting-attendance rule, which required that candidates have attended at least one-half of the union's regular monthly meetings during the three years before the election, was not a reasonable qualification.

Consistent with the LMRDA's command that unions conduct free and democratic elections, Congress intended Section 401(e)'s authorization of reasonable qualifications to be narrowly construed. See *Wirtz* v. *Hotel Employees Union, Local 6*, 391 U.S. 492, 499 (1968). Moreover, the LMRDA's check on the power of incumbents is "seriously impaired by candidacy qualifications which substantially deplete the ranks of those who might run in opposition to [them]." *Ibid.* In accordance with these principles, the Court in *Steelworkers* placed strong emphasis on the previous meeting-attendance rule's high rate of exclusion in holding that the rule was unreasonable. 429 U.S. at 309-310. The Court explained that "an attendance requirement that results in the exclusion of 96.5% of the members from candidacy for union office hardly seems to be a 'reasonable qualification' consistent with the goal of free and democratic elections." *Id.* at 310. The Court also rejected the union's argument that the rule was permissible because it imposed a qualification that any member could meet by attending 18 brief meetings

over a three-year period. *Id.* at 310-311. The Court concluded that the union's argument "misconceive[d] the evil at which the statute aims" because the eligibility rule must be judged "not by the burden it imposes on the individual candidate but by its effect on free and democratic processes of union government." *Id.* at 310-311 n.6. Moreover, the Court explained, even if examined as a procedure for qualification, the rule had a restrictive effect on union democracy because members' interest in changing union leadership is "likely to be at its highest only shortly before elections." *Id.* at 311.

The Court also rejected the union's argument that the rule was reasonable because it encouraged attendance at union meetings. *Steelworkers*, 429 U.S. at 312. The Court held that, given the members' low attendance rate, the rule had not served the purpose of generating attendance by members generally; and, as to encouraging the attendance of potential dissident candidates, the Court reiterated that "very few members * * * are likely to see themselves as [candidates] sufficiently far in advance of the election to be spurred to attendance by the rule." *Ibid.* Finally, the Court held that, as to the goal of assuring knowledgeable and dedicated leaders, Congress determined in the LMRDA that the best means to achieve that end is to leave the choice of leaders to the membership in open and democratic elections, unfettered by arbitrary exclusions that bar the bulk of members. *Ibid.*

In holding that the revised meeting-attendance rule at issue here is also not a reasonable qualification, the court of appeals considered the same factors that this Court considered in *Steelworkers*. As compared to the previous, invalid rule, the revised rule reduced the number of required meetings (to one-third of the meetings over a two-year period) and expanded the types of

excused absences.[3] The court of appeals first held that a condition of eligibility that disqualifies the vast bulk of the union's membership (here 92%) from standing for candidacy is presumptively unreasonable and shifts the burden to the union to present reasons justifying the rule. A presumption of unreasonableness finds strong support in this Court's bedrock conclusion in *Steelworkers* that a rule that excludes such a high percentage of the membership (there over 96%) "hardly seems to be a 'reasonable qualification' consistent with the goal of free and democratic elections." 429 U.S. at 310.

Petitioner does not directly challenge this burden-shifting analysis, but rather contends (Pet. 17) that the court of appeals unduly restricted the factors that can be considered to justify a rule. To substantiate this assertion, petitioner cobbles from disparate portions of the court of appeal's opinion "a three factor test" (Pet. 17 & n.3) that the court itself did not articulate or impose.[4] Contrary to petitioner's formulation, the court

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[3] The original rule allowed excuses only for absences due to a conflict with a member's union activities or working hours. *Steelworkers*, 429 U.S. at 306-307.

[4] For example, petitioner asserts that the third criterion of the lower court's test is that the union must "show that its meetings are conducted according to various procedures of that court's devising, such as mailing of agendas in advance of each meeting to all members." Pet. 17 n.3. This "criterion" is taken from a portion of the court's opinion in which the court described the absence of information in the record on the nature of petitioner's meetings. There is no indication in that discussion, Pet. App. 3a, or in the court's later formulation and application of its standard, *id.* at 6a-8a, that the court intended compliance with such supposed procedural requirements to constitute one criterion in a three-part test. Similarly, the court in its general discussion questioned the legitimacy of the union interest underlying the rule, when members, by dint of the excuse provision, can qualify without having attended a

of appeals held that a union could rebut the presumption by showing that a rule "is either not burdensome or though burdensome is supported by compelling need." Pet. App. 6a. That open-ended formulation permits consideration of all the factors contained in the Secretary's interpretive regulation addressing meeting-attendance rules, 29 C.F.R. 452.38(a), which this Court cited approvingly in *Steelworkers* and which petitioner appears to accept (Pet. 19) as the appropriate multi-factor test for determining reasonableness.

Moreover, the reasons that the court of appeals gave for concluding that the rule in this case was burdensome and unsupported by compelling need are harmonious with *Steelworkers*. For example, the court's determination that the rule imposed an undue burden was based, in large measure, on its recognition that an eight-monthly-meeting rule requires members to make up their minds about candidacy many months before the election. Pet. App. 7a. That consideration mirrors *Steelworkers'* recognition that issues that motivate union candidacy are likely to arise only shortly before the election. 429 U.S. at 311. And, although the time before the election by which a candidate was required to begin attending meetings was lengthier in *Steelworkers* than in this case—18 months instead of eight months—the issue of the precise period of time that crosses the reasonableness threshold is not worthy of this Court's review. That is particularly true here because the court of appeals' conclusion that eight months is too long is consistent with the conclusions of

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single meeting. *Id.* at 4a. In its application of the standard, however, the court nowhere stated, as petitioner contends (Pet. 20), that the existence of an excuse provision is fatal to a rule's reasonableness.

other courts of appeals on the question. See p. 13, *infra*.

The further ruling of the court of appeals that petitioner did not show an underlying purpose that would justify the rule also mirrors the Court's reasoning in *Steelworkers*. For example, as this Court had in *Steelworkers*, the court of appeals relied on the low turnout at union meetings as evidence that the rule was ineffective in accomplishing the goal of promoting attendance by members generally or by opponents of the incumbents in particular. Compare Pet. App. 7a with *Steelworkers*, 429 U.S. at 312. Moreover, the court reasonably relied on the union's failure to consider alternative means to induce attendance at meetings, or to make any argument that its interests would not be adequately served by a rule requiring attendance at fewer meetings, permitting a later decision to commit to running for office. Pet. App. 7a.

2. Petitioner contends (Pet. 11-18) that this Court's review is needed because the courts of appeals have read *Steelworkers* in "three different and irreconcilable ways." Pet. 11. Contrary to that contention, the courts of appeals have reached consistent holdings in cases that have presented different facts. Although petitioner identifies some divergence in statements that the different courts have made regarding the consequences when a meeting-attendance rule excludes a high percentage of the union membership, this Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956). Moreover, this case would not be an appropriate one in which to resolve any tension among the courts of appeals regarding whether the "percentage-disqualified factor [is] dispositive in meeting attendance rule cases" (Pet. 14), because the court of appeals here ruled in petitioner's

favor on that question. The court of appeals held that the 92% exclusion rate resulting from petitioner's rule did not alone render the rule invalid; rather, the court concluded that additional factors required the conclusion that the rule was unreasonable. Pet. App. 6a-8a.

a. In the 23 years since *Steelworkers*, three courts of appeals, other than the court of appeals in this case, have considered Section 401(e)'s "reasonable qualifications" standard in relation to meeting-attendance rules. In two of those cases, the courts held or strongly intimated that rules requiring attendance at meetings at least six months before the election were unreasonable. See *Marshall* v. *Local 1402, Int'l Longshoremen's Ass'n*, 617 F.2d 96, 97 & n.1 (5th Cir.) (invalidating rule requiring candidates to have attended at least one bimonthly meeting in each of the ten months preceding election and resulting in exclusion of 93.7% of membership), cert. denied, 449 U.S. 869 (1980); *Doyle* v. *Brock*, 821 F.2d 778 (D.C. Cir. 1987) (holding that the Secretary had acted arbitrarily and capriciously in failing to challenge an election in which the meeting-attendance rule required attendance at six monthly meetings in the year preceding the election and rendered 97% of the membership ineligible). In *Herman* v. *Springfield Massachusetts Area, Local 497, American Postal Workers Union* (*Postal Workers*), 201 F.3d 1 (2000), the First Circuit upheld a meeting-attendance rule that required attendance at only three monthly meetings during the twelve month period preceding the nominations meeting, even though the rule excluded a large percentage of the membership.

The judgment of the court of appeals in this case, which invalidated a rule requiring attendance at eight monthly meetings during the two years before the election, fits comfortably within the pattern of the post-

Steelworkers decisions. Rules, like the one at issue here, requiring attendance at six or more monthly meetings—and thus requiring members to have commenced attendance at meetings six or more months before the election—have been viewed as unreasonable. *Local 1402*, *supra* (ten meetings); Pet. App. 7a (eight meetings); *Doyle*, *supra* (six meeting requirement and high disqualification rate presented sufficient indicia of unreasonableness that Secretary must bring suit). On the other hand, the sole court of appeals decision to sustain a rule, the First Circuit's decision in *Postal Workers*, addressed a three-meeting rule, which clearly imposes a lesser (although not insubstantial) burden on the democratic process. Thus, the results in the four cases that have been decided since *Steelworkers* are fully consistent with one another.

b. Although the reasoning of the four decisions is not entirely uniform, petitioner exaggerates in asserting that the courts of appeals have approached the meeting-attendance question in "three different and irreconcilable ways." Pet. 11 (referring to the approaches of the court of appeals in this case, the First Circuit in *Postal Workers*, and the D.C. Circuit in *Doyle*).[5] Indeed, the court of appeals in this case concluded that the framework it endorsed—under which a rule's high rate of exclusion creates a presumption of unreasonableness but permits a union to demonstrate the rule's lack of burdensomeness or the union's compelling need—is consistent with *all* of the post-

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[5] Petitioner ignores the Fifth Circuit's holding in *Local 1402*, that the ten-monthly-meeting rule there created a ten-month "advance-intention" requirement that was unreasonable. That holding is in substantial accord with the decision in this case that an eight-month "advance-intention" requirement is unreasonable.

Steelworkers appellate authority on meeting-attendance rules. Pet. App. 6a.

There is no basis for petitioner's contrary contention that the reasoning of the court of appeals here conflicts with the decision of the First Circuit in *Postal Workers*. The court of appeals here expressly agreed with the First Circuit that a rule's high rate of exclusion is not dispositive of the rule's validity, and the court distinguished the rule at issue here from the three-meeting rule approved in *Postal Workers* on the ground that the *Postal Workers* rule permitted a prospective candidate to come into compliance at a time much closer to the election. Pet. App. 7a-8a. Moreover, as previously explained (see p. 9 & note 4, *supra*), petitioner errs in describing the court of appeals' opinion in this case as applying a three-factor test that differs from the analysis in *Postal Workers*.[6]

Petitioner also errs in characterizing the District of Columbia Circuit as adopting in *Doyle* an inflexible rule that a meeting-attendance requirement that excludes a high percentage of union members from candidacy is always invalid. Neither the court of appeals in this case nor the First Circuit in *Postal Workers* read *Doyle* as establishing an absolutely rigid rule. See Pet. App. 6a (concluding that its decision was consistent with *Doyle*, "the *most* 'per se' of the opinions") (emphasis added); *Postal Workers*, 201 F.3d at 4 (stating that "[o]ne

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[6] Petitioner's assertion (Pet. 19) that it would prevail under the First Circuit's approach in *Postal Workers* is without basis. *Postal Workers* distinguished *Doyle* on the ground that it involved a six-meeting rule that was more burdensome than the one at issue in that case. 201 F.3d at 5. *Postal Workers*, in which the analysis did not range much beyond its holding rejecting a per se percentage test, thus gave absolutely no indication that an eight-month meeting-attendance rule would be approved by that Circuit.

circuit court decision [*Doyle*] does—*to some extent*—support the view" that a percentage test is conclusive) (emphasis added). As those courts correctly recognized, the District of Columbia Circuit permits a showing of a high rate of exclusion to be rebutted by a showing of compelling need. See 821 F.2d at 785. In that respect, the decision in *Doyle* is consistent with the analysis applied by the court of appeals in this case.[7]

Even if there were a divergence in approach on whether the "percentage-disqualified factor [is] dispositive in meeting attendance rule cases" (Pet. 14),

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[7] The District of Columbia Circuit and the Seventh Circuit may diverge on the narrow question whether a union can rebut the inference of unreasonableness that is raised by a high rate of exclusion by showing that the rule at issue is not actually burdensome. Compare 821 F.2d at 785 (rule must be justified by interests it advances) with Pet. App. 6a (rule may be justified by showing either that it is not burdensome or that it is supported by compelling need). Even if there is disagreement on that question, the standard applied by the court of appeals here is the one more favorable to petitioner, and the court held that petitioner had not satisfied it.

Moreover, the question whether there is a conflict in the circuits on this particular question is complicated by the fact that *Doyle* did not resolve whether the union rule at issue was reasonable under the LMRDA, but only whether the Secretary acted arbitrarily and capriciously in refusing to bring suit. See 821 F.2d at 783 n.4 (noting that the union, which was not a party to the suit, could raise other justifications and legal theories to defend the suit on the merits); *id.* at 787 (Silberman, J., dissenting) (noting that, had the Secretary brought suit on the merits, he might have been able to find common ground with the majority). Thus, if confronted directly with the reasonableness of a rule in a suit under Section 402(b), the District of Columbia Circuit could resolve that question differently, particularly in light of the intervening decisions in *Postal Workers* and this case, and decide that a rule with a high rate of exclusion, but a demonstrated lack of burden, is reasonable.

petitioner has not been aggrieved by the court of appeals' resolution of that issue. The court decided that question in petitioner's favor and held that the fact that the rule disqualified 92% of the membership was not dispositive. Pet. App. 6a. It permitted the union to attempt to show that the rule was justified despite its impact, either because it did not burden the democratic process or the burden was justified by countervailing interests. *Ibid.* The court, however, ultimately determined that the rule was burdensome and could not be justified on the ground advanced by petitioner—namely, that it was necessary to bolster meeting attendance and participatory democracy. *Id.* at 7a. Petitioner's rule is, accordingly, unreasonable whether judged by a per se percentage test or by the more flexible test employed by the court of appeals. There is therefore no reason to grant review in this case to consider which of those two approaches is correct.

3. Petitioner places heavy emphasis (Pet. 3, 5-6, 14, 15-16) on the history of the Department of Labor's enforcement of Section 401(e) with respect to meeting-attendance rules. Although that history reveals that the Department has altered its approach to meeting-attendance rules in the face of developments in the case law, nothing in the history suggests that the court of appeals committed legal error. Most of petitioner's discussion is designed to show that the Department has taken inconsistent positions with respect to whether a "multi-factor" or "per se percentage" test applies and to corroborate petitioner's position that a multi-factor test is the appropriate standard.[8] As we have explained,

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[8] Petitioner errs in relying (Pet. 5, 19) on a 1978 letter from an Assistant Secretary of Labor to the International opining that a rule requiring attendance at one-third of the meetings in the 24

however, petitioner prevailed on that issue and obtained what was essentially a "multi-factor" analysis from the court of appeals, which correctly invalidated petitioner's meeting-attendance rule. See pp. 11-12, *supra*. Moreover, the court invalidated the rule, not because the court concluded the Secretary's regulation required that result, see Pet. App. 5a (rejecting deference to the Secretary's regulation), but because the court concluded that the language and purpose of the LMRDA and of this Court's *Steelworkers* decision required it.

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months preceding the election, with excuse provisions, would "be reasonable as to the number of meetings required to be attended and would not be subject to challenge because of the percentage of the membership which failed to qualify." Letter from Francis X. Burkhardt, Assistant Secretary of Labor, to Lloyd McBride & Lynn R. Williams, United Steelworkers 2 (Sept. 15, 1978). Petitioner neglects to point out that the Department informed the International in April 1994, well before the election in this case, that the Department no longer adhered to the opinion in the 1978 letter. Letter from Edmundo A. Gonzales, Deputy Assistant Secretary for Labor-Management Standards, to George F. Becker, International President, United Steelworkers (Apr. 19, 1994). The government's change of position does not bear on whether the court of appeals' decision in this case is correct because that court did not accord deference to the Department's views in holding that petitioner's meeting-attendance rule is unreasonable. Pet. App. 5a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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LOCAL UNION 1011, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

ALEXIS HERMAN, SECRETARY OF LABOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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ARGUMENT

In *Local 3489 Steelworkers v. Usery*, 429 U.S. 305 (1977), this Court granted *certiorari* to settle the important Labor-Management Reporting and Disclosure Act § 401(e) question of the appropriate standard for determining the reasonableness of union meeting attendance candidacy requirements. The gist of our *certiorari* petition is that the *Local 3489* decision, rather than settling that question, has generated a three-way circuit conflict resulting from

(i) the First Circuit's holding in *Herman v. Springfield, Mass. Area Local 497, Postal Workers*, 201 F.3d 1, 5 (2000) ("*Postal Workers*"), that meeting attendance rules are to be judged by the multi-factor standard set out in the Secretary of Labor's 29 C.F.R. 452.38(a) regulations in force at the time of the *Local 3489* litigation;

(ii) the D.C. Circuit's holding in *Doyle v. Brock*, 821 F.2d 778, 785 (1987)—later adopted by the Secretary as a matter of judicial *force majeure*—that the "impact" of a meeting attendance requirement as measured by the "percentage who would be rendered ineligible by its application," is "by itself sufficient to make the requirement unreasonable *notwithstanding any . . . other factors*," 29 C.F.R. 452.38(a) n.25 (emphasis added); and

(iii) the Seventh Circuit's holding below that the reasonableness of meeting attendance rules is to be assessed by a three-factor test different from the Secretary's historic multi-factor test.

The gist of the Secretary's Brief in Opposition is that these evident discordances can somehow be harmonized through the understandings

(i) that the Seventh Circuit standard provides not for the three-factor inquiry that we outlined, but for a two-

step inquiry according to which (a) a meeting attendance rule that results in a high percentage of disqualified members may be justified by a convincing union showing that the rule is not burdensome; and (b) if the union's showing in that regard falls short, by a convincing union showing that the rule serves compelling union needs, Brief in Opp. 10;

(ii) that the D.C. Circuit *Doyle* standard does not, as we stated, provide that a meeting attendance requirement is invalid *per se* on a showing that a high percentage of a union's members failed to satisfy the requirement, but instead provides that such a showing creates a presumption of invalidity that, as the Secretary recognizes, can *not* be overcome by a union showing that the rule is not burdensome, but, according to the Secretary, *can* be overcome by a union showing that the requirement serves a compelling need, Brief in Opp. 15 & n.7; and

(iii) that, while the First Circuit standard is, as we stated, the Secretary's historic multi-factor 29 C.F.R. 452.38(a) standard, that is of no moment here, because the First Circuit decision so stating came out of a case involving a less demanding meeting attendance requirement than the Steelworkers' requirement at issue here, Brief in Opp. 12-13.

Even though it is the point on which the Secretary is most competent to speak, the Secretary *never* addresses the disharmonies between the court of appeals' meeting-attendance-rule standards and the standard of the Secretary's present enforcement policy, *viz.*, the standard providing that, where a high percentage of the union's members do not satisfy a particular meeting attendance requirement, that factor is "by itself sufficient to make the requirement

unreasonable notwithstanding any . . . other factors." 29 C.F.R. 452.38(a) n.25; *see also* 60 Fed. Reg. 26391 (May 17, 1995) (announcing that the Labor Department will take "enforcement action whenever a meeting attendance requirement disqualifies a large portion of a union's membership from candidacy"). This silence is particularly telling in that the Secretary's standard is not only different from the standard that the Brief in Opposition ascribes to *any* of the court of appeals decisions, it is a standard that the First and the Seventh Circuits have rejected in no uncertain terms as contrary to law.

In this Reply, we show that the Secretary's attempt to create harmony out of discord does not succeed. While the Secretary's reading of the Seventh Circuit's decision is a defensible—albeit not the most apparent—reading of the decision below, that does not alter our basic point that on either the Secretary's reading or ours, the Seventh Circuit's standard is different from the D.C. Circuit standard, different from the First Circuit standard, and different from the Secretary's enforcement standard—and in an outcome determinative way. In the course of that showing, we demonstrate (i) that the reading of the D.C. Circuit *Doyle* decision proffered by the Secretary in her Brief in Opposition is not only contrary to the Secretary's consistent reading of that decision from its issuance until the filing of her brief here, but implausible on its own terms; and (ii) that the Steelworkers' meeting attendance rule is reasonable and valid under the First Circuit/pre-*Doyle* multi-factor standard, as the Secretary should be the first to acknowledge.

Before turning to those particulars, we would emphasize this salient point: giving the Brief in Opposition all that it asks for and more than it is due, that brief does not in fact rationalize the court of appeals law or bring that law into line with the Secretary's enforcement policy. The truth of the matter is that the LMRDA meeting-attendance-rule legal

regime created by *Doyle*, *Postal Workers*, the decision below, and the Secretary's enforcement policy is one that is utterly irrational and arbitrary. Under the present regime, the Secretary sues to overturn any election run under a meeting attendance rule that does not satisfy a pure *post hoc* "percentage impact" test in order to avoid being sued by a complaining union member in the D.C. Circuit on the basis of the *Doyle* decision. *See* Pet. 6-7, 18-19 (showing that Secretary offered no reason other than the fear of being sued in the D.C. Circuit for her enforcement policy). Yet the Secretary's enforcement policy standard has now been rejected by the First Circuit and the Seventh Circuit. And, to bring us to the surreal, the Secretary, in the face of her longstanding enforcement-policy reading of *Doyle*, now offers up a different, revisionist reading of *Doyle* that destroys the policy's stated legal base.

Plainly, this is not the coherent legal regime that the *Local 3489* decision was intended to create. And, only a second decision by this Court giving an authoritative gloss on *Local 3489* can create such a regime.

1. As we have said, the Secretary reads the Seventh Circuit's decision below as adopting a two-step test for judging the legality of meeting attendance requirements, Br. in Opp. 10, rather than the three-factor test we outlined at Pet. 10-11. We would note in this regard that the Secretary's tendentious reading of that decision depends on dismissing more than half of the Seventh Circuit's analysis (including a full page on the import of "excuse" provisions) as a series of irrelevancies.

But we do not belabor this point here, for what is essential at this jurisdictional stage is that, on the Secretary's reading of the decision below, as on ours, the Seventh Circuit's position on the proper interpretation of § 401(e) and *Local 3489* conflicts with the positions of the D.C. Circuit in *Doyle* and the First Circuit in *Postal Workers*.

a. The Seventh Circuit's approach is not the *Doyle* approach or the approach of the Secretary's enforcement policy as stated in the *Doyle* footnote to 29 C.F.R. 452.38(a). The Seventh Circuit bluntly called the *Doyle* footnote "wrong." Pet. App. 5a. And the Secretary, though at one point appearing to suggest that the decision below can be harmonized with *Doyle* (Brief in Opp. 14-15), ultimately concedes that under the Seventh Circuit's analysis—but *not* under the D.C. Circuit's *Doyle* analysis—a meeting attendance rule which has a high "percentage impact" can be defended on the basis that it is "not burdensome." Brief in Opp. 15 n.7.

Despite that concession, the Secretary attempts to obscure the differences between *Doyle* and the decision below by stating that *Doyle* did not adopt an "inflexible rule that a meeting-attendance requirement that excludes a high percentage of union members from candidacy is always invalid." Brief in Opp. 14. As we have stressed, the Secretrary herself—both in her published statement in the Federal Register setting forth the Labor Department's enforcement policy and in the language of the operative footnote amendment to her regulation—characterizes *Doyle* as adopting precisely such an inflexible rule. Indeed, the footnote amendment to her regulations states that *Doyle* "held that the impact of a meeting attendance requirement which disqualified 97% of the union's membership from candidacy was *by itself* sufficient to make the requirement unreasonable *notwithstanding any of the other factors set forth in 29 C.F.R. 452.38(a).*" 29 C.F.R. 452.38(a) n.25 (emphasis added).[1]

[1] An April 1994 letter from the Labor Department to the Steelworkers—adverted to by the Secretary (Brief in Opp. at 17 n. 8)—serves to reinforce the point that the Labor Department's interpretation of *Doyle* has always been the one reflected in the footnote amendment to 29 C.F.R. 452.38(a). The 1994 letter stated that *Doyle*, by "emphasiz[ing] the importance of impact alone in determining the

And, for better or worse, the foregoing reading of *Doyle*—and not the Secretary's Brief-in-Opposition reading of *Doyle*—is the accurate one.[2]

In all events, as we noted in discussing the Secretary's treatment of the Seventh Circuit's decision below, the Secretary concedes that *Doyle*—even when given the more "flexible" reading that she now proffers—*still* cannot be reconciled with the Seventh Circuit's decision, in that the latter decision holds that a meeting attendance rule which does not pass the "percentage impact" test "may be justified by showing ... that [the rule] is not burdensome," whereas *Doyle* does not permit such a justification. Brief in Opp. at 15 n.7.

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reasonableness of a meeting attendance requirement," had created "a conflict [with] policies and decisions previously adopted by our agency," and had made it "questionable" whether the agency could successfully "sustain the denial of a challenge to a meeting attendance rule based solely on impact." 1994 Letter, pp. 1-2. The 1994 letter went on to inform the Union that the Department, in the wake of *Doyle*, could no longer adhere to its 1978 position that the Steelworkers' rule "would not be subject to challenge solely on the basis of its impact (i.e., the percentage of the membership which failed to qualify under it)." *Id.* at 1.

[2] *Doyle* says in clear terms: "There is *no* basis, in *Steelworkers [Local 3489]* or in any other case, for the notion that an attendance requirement that has a large antidemocratic effect [as measured by the percentage of members who do not satisfy the requirement] can be reasonable on its face, and that some additional factor is necessary to find the requirement violative of the LMRDA." 821 F.2d at 785 (emphasis in original). And, though *Doyle* states generically that, under the LMRDA, union office eligibility requirements which a high percentage of members do not satisfy can be defended if they serve "valid union interests," *id.*, the decision goes on to add that in the specific case of *meeting attendance* eligibility requirements, there is *no* such defense available, because, as the court saw it, none of the interests advanced by the Secretary in *Doyle* (or by unions in other cases) in support of meeting attendance requirements are sufficiently vital to justify such requirements where a high percentage of members do not attend the requisite number of meetings, *id.* at 785-86.

Indeed, the Secretary, in a testament to her failure to square *Doyle* with the decision below or with the First Circuit's *Postal Workers* decision, holds out the prospect that the D.C. Circuit one day "could resolve th[e] [percentage impact] question differently" than that court did in *Doyle*, Brief in Opp. at 15 n.7—and in so doing retreat from the improper standard stated in *Doyle*, free the Secretary from her irrational enforcement policy, and bring reason and uniformity to the meeting-attendance-rule law. While we would most heartily agree that a new and different D.C. Circuit meeting-attendance-requirement standard would be welcome, there is no sign that any such D.C. Circuit action is forthcoming.

b. The Seventh Circuit's standard differs not only from the *Doyle* standard and the Secretary's enforcement-policy standard, but also from the Secretary's *pre*-Doyle/29 C.F.R. 452.38(a) standard which the First Circuit followed in *Postal Workers*, 201 F.3d at 5 (stating that the court "share[s]" the view of the § 401(e) case law that the Secretary had championed in *Doyle* and that the D.C. Circuit rejected).

That aspect of this three-way conflict is of particular moment here, for the Secretary reviewed under her original standard the Steelworkers' meeting attendance requirement at issue here—which was adopted after the *Local 3489* decision to bring the requirement into conformity with LMRDA § 401(e) as interpreted by this Court in that decision—and she determined that it "would be regarded as *reasonable within the [29 C.F.R. 452.38(a)] guidelines*, even if its application resulted in the disqualification of a high proportion of the membership." 1978 Letter at 1 (emphasis added). *See also* Pet. 5. In making that determination, the Secretary, of course, knew from the face of the Steelworkers' requirement that attendance had to begin eight months prior to an election, and the Secretary, *unlike the Seventh Circuit*, found the eight-

month period to be one that does *not* impose an unreasonable "burden" on candidacies. *See* 1978 Letter at 1, 2.[3]

Against all this, the Secretary suggests that the First Circuit might well invalidate the Steelworkers' rule, and that the court's *Postal Workers* decision is not a sufficient indication to the contrary since the *Postal Workers* meeting attendance requirement could be met by attendance at the meetings within four months of the election, rather than eight months as provided for by the Steelworkers' requirement. Brief in Opp. 12-13. But the First Circuit made a point of emphasizing in *Postal Workers* that this Court's *Local 3489 Steelworkers* decision "approved the Secretary's own flexible, multi-factor test for reasonableness." 201 F.3d at 5. And, that being so, it is bootless for the Secretary to contend that, even though she applied that test to the very rule at issue here and determined that the rule is reasonable, the First Circuit nevertheless would reject her application of her own test and substitute a contrary judicial application in its stead.

2. After attempting to harmonize the court of appeals case law, the Secretary falls back on the contention that this case is not a suitable vehicle to resolve the conflict that obtains and

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[3] The Secretary attempts to denigrate the significance of her earlier review and approval of the Steelworkers' rule by asserting that "the Department [of Labor] informed the International in April 1994, well before the election in this case, that the Department no longer adhered to the opinion in the 1978 letter." Brief in Opp. 17 n.8. But, as explained in note 1 *supra*, in the April 1994 letter, the Labor Department did *not* state that it had retracted its opinion concerning the proper application of the Department's historic multi-factor test, much less that it had reconsidered whether requiring attendance at eight monthly meetings is unduly "burdensome." Rather, as that letter states, the Department felt it necessary, solely as a result of *Doyle*, to withdraw the assurances it had given in the 1978 letter ruling to the effect that the Steelworkers' rule would not be subject to challenge on the basis of the percentage of the membership which failed to satisfy the requirement. *See* note 1 *supra*.

that this case is therefore not cert-worthy. Brief in Opp. 15-16. The Secretary's contention in this regard is as feckless as the Secretary's contention that the court of appeals' meeting-attendance-requirement law is consistent and coherent.

The D.C. Circuit and the Seventh Circuit read *Local 3489* as a decision that, at once, *confirms* that the Secretary was correct in her contention that the eighteen-month meeting attendance requirement at issue there fails the Secretary's 29 C.F.R. 452.38(a) standard of legality; and, at the same time, *rejects* the 29 C.F.R. 452.38(a) standard itself, authorizing the courts of appeal to substitute a different and more stringent standard—a standard which invalidates rules that would pass muster as "reasonable" under the Secretary's traditional enforcement policy. Our submission, in contrast, is that *Local 3489*—in sustaining the Secretary's effort to effectuate her traditional enforcement policy, and in quoting with approval the regulation setting out the 29 C.F.R. 452.38(a) standard—was not intended to work a change in the law and cannot properly be read to have done so.

Because the Labor Department has applied the original 29 C.F.R. 452.38(a) standard to the Steelworker requirement at issue in this case and the agency has made a determination that the rule is reasonable and valid under that standard, this case is not only an appropriate, but in many ways an ideal, vehicle for resolving the conflict over the meaning of *Local 3489*. For that agency determination (a) makes it plain that the resolution of the dispute just outlined over the meaning of that decision is outcome-determinative, and (b) spares this Court the need to venture a *de novo* judicial determination of the requirement's reasonableness. If the conflict is resolved by reading *Local 3489* to *endorse* the enforcement policy reflected in the original 29 C.F.R. 452.38(a) standard, the Union will necessarily *prevail* on the strength of the Secretary's own application of that standard; and, if the conflict is resolved in favor of either the D.C. Circuit or

Seventh Circuit reading of *Local 3489*, the Union will *not* prevail. This case is thus cert-worthy in every respect.

CONCLUSION

For the foregoing reasons and those stated in the *certiorari* petition, the petition should be granted.

Respectfully submitted,

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